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No.

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In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Cross-Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

CROSS-PETITION OF CROSS-PETITIONER/RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the District of Columbia Circuit

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QUESTION PRESENTED

May the Interstate Commerce Commission, pursuant to 49 U.S.C. §11341(a), exempt rail carriers participating in a trackage rights transaction from the provisions of the Railway Labor Act (45 U.S.C. §§151 *et seq.*) and from their obligations under 49 U.S.C. §11347 to preserve all rules, working conditions and collective bargaining rights of their employees, thereby depriving the employees of a voice in the process of determining which persons may operate the trains performing those trackage rights?

PARTIES TO THE PROCEEDINGS

Brotherhood of Locomotive Engineers and United Transportation Union are the bargaining representatives for certain employees of the involved railroads and were petitioners in the proceedings before the court of appeals below.

Interstate Commerce Commission and United States of America were respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Missouri Pacific Railroad Company and Union Pacific Railroad Company were intervenors in support of the Interstate Commerce Commission. The Association of American Railroads and National Railway Labor Conference appeared as *amici curiae* in support of petitions for rehearing and suggestions for rehearing *en banc*.

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CROSS-PETITION OF CROSS-PETITIONER/RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the District of Columbia Circuit

The Brotherhood of Locomotive Engineers ("BLE") cross-petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered May 3, 1985, as amended July 12, 1985. The judgment of the court of appeals vacated two orders of the Interstate Commerce Commission ("ICC" or "Commission"), which held that the Commission's approval of trackage rights applications by the Missouri-Kansas-Texas Railroad Company ("MKT") and the Denver & Rio Grande Railroad Company ("D&RGW") in Finance Docket No. 30,000 exempted MKT, D&RGW and also Union Pacific Railroad Company ("UP") and Missouri Pacific Railroad Company ("MP") from the requirements of 49 U.S.C. §11347 and the Railway Labor Act. The court of appeals remanded to the ICC with directions to determine the ground upon which it was necessary to relieve

the involved carriers from having to bargain with their employee representatives on the process of crew selection.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 761 F.2d 714 (1985). It appears in the Appendix at 1a-45a, with the order amending the opinion of the court at 48a-49a. The Commission's orders are reported and appear in the Appendix at 55a and 60a.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1985, and was amended on July 12, 1985. On August 9, 1985, the court of appeals entered orders denying petitions for rehearing and suggestions for rehearing *en banc,* which had been submitted by the ICC and the interested railroads. Petitions for a writ of certiorari were timely filed by the Commission and MKT with the Court on November 7, 1985. The petitions were docketed as Nos. 85-792 and 85-793 respectively. Copies of the petitions were received by respondent BLE on November 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 19.5 of the Rules of this Court.

STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act (49 U.S.C. §§11341(a), 11343, 11344 and 11347) and the Railway Labor Act (45 U.S.C. §§152, First and Seventh and 156). The pertinent provisions of these statutes are set forth in the Appendix at 75a-87a.

STATEMENT OF THE CASE

This case raises the important and yet undecided question as to whether the Interstate Commerce Commission has the authority to relieve railroads participating in transactions approved by the ICC under 49 U.S.C. §§11343 and 11344 from their collective bargaining obligations under 49 U.S.C. §11347 and the Railway Labor Act (45 U.S.C. §156). In orders issued on May 18, 1983 and on October 25, 1983, the Commission held that it had jurisdiction to exempt carriers involved in transactions approved under 49 U.S.C. §§11343 and 11344 from the unilateral change proscriptions of the Railway Labor Act, 45 U.S.C. §156 (58a, 64a), and that the exemption contained in Section 11341 automatically relieved the carriers from their collective bargaining obligations as to the assignment of crews for the involved trackage rights operations (65a, 74a).

Ruling that the exemption could only be allowed if the Commission makes specific findings under 49 U.S.C. §11341 justifying the exemption on the basis that termination of the right "to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction," the court of appeals remanded (22a, 47a). Both the decisions of the ICC and the court of appeals are inconsistent with the statutory language and purposes and with the Commission's longstanding interpretation of its jurisdiction and of the Interstate Commerce Act. In addition, the decisions contravene decisions of this Court and are in conflict with decisions from the other circuit courts of appeals.

Moreover, these decisions have led to a rash of lawsuits arising from unilateral changes in working conditions

which various carriers have made based upon purported exemptions granted through ICC approved transactions. Thousands of railroad employees face a loss of their jobs and, on the other hand, certain railroads will have to needlessly pay the protective benefits prescribed by 49 U.S.C. §11347 to employees losing those positions. Accordingly, the question of statutory interpretation raised in this case is one that requires review by this Court in fulfillment of its supervisory powers.

In 1976, the Congress amended Section 5(2)(f) of the Interstate Commerce Act, which was later repealed by the recodification of the Interstate Commerce Act effected by Public Law 95-473, 92 Stat. 1337 (1978), and was recodified as Section 11347, and placed a limitation upon the ICC to the extent that:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 . . . of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by this transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45.

Sections 565 (b)(1) and (2) of Title 45 include a requirement that the railroads preserve the Railway Labor Act rights of the affected employees.

The employee protective conditions first formulated by the ICC pursuant to Section 11347 were those imposed in *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), *aff'd sub nom. New York Dock Railway v. I.C.C.*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions are the minimum

levels of employee protection required to be imposed in control, merger or purchase cases. *See Union Pacific - Control - Missouri Pacific,* 366 I.C.C. 459, at 620 (1982). Trackage rights requests are subject to the employee protective conditions specified in *Norfolk & Western Ry. Co. - Trackage Rights - BN,* 354 I.C.C. 605 (1978) (*N&W*), modified by *Mendocino Coast Ry., Inc. - Lease and Operate,* 360 I.C.C. 653, 664 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC,* 675 F.2d 1248 (D.C. Cir. 1982). In accordance with the mandate of Section 11347 to incorporate the terms of protection established under 45 U.S.C. §565, Article I, Section 2 of both the *New York Dock* and *N&W* conditions preserves all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroad employees under applicable law and/or existing collective bargaining agreements or otherwise. . . ."

In September 1980, UP and MP, along with Western Pacific, applied to the ICC for approval to consolidate their operations. The Commission approved the proposed consolidation on October 20, 1982. *See Union Pacific - Control - Missouri Pacific,* 366 I.C.C. 459 (1982), *affirmed in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984) (*per curiam*), *cert. denied,* ..... U.S. ....., 105 S. Ct. 1172 (1985). As a condition to this approval, the ICC directed MP and UP to give MKT and D&RGW the right to operate over a portion of their tracks. MKT was granted the right to operate over several routes, including operations over MP's tracks between Kansas City, Kansas and Omaha, Nebraska, a distance of approximately 200 miles (366 I.C.C. at 465). D&RGW was granted the right to operate over MP's tracks between Pueblo, Colorado and Kansas City, Missouri, a distance of 619 miles (366 I.C.C. at 572).

Although MKT and D&RGW commented on crew selection in their applications for the trackage rights, the ICC did not mention that subject in granting those applications. The ICC's only reference to labor arrangements in exercising the trackage rights was the notation that its general trackage rights approval was the subject of the *N&W* conditions protecting the railroad employees' rights in such situations (366 I.C.C. at 654; *id.* at 621-622).

Soon after the consolidation became effective, D&RGW and MKT commenced their approved trackage rights operations. Although MP informed BLE that D&RGW would use its own crews in the future, D&RGW has used MP operating crews on the MP tracks to present (22a; JA at 6). MKT, however, has used its own crews (JA 74).

Both BLE and the United Transportation Union objected. Unknown to BLE, the United Transportation Union threatened a strike against MP for refusing to negotiate, which strike has been permanently enjoined. *Missouri Pacific R. Co. v. United Transp. Union,* 580 F. Supp. 1490 (E.D. Mo.), appeal docketed, No. 84-1465 (8th Cir. 1984).

BLE, however, went to the Commission. On April 4, 1983, BLE filed a Petition for Clarification based upon communications from MP that D&RGW and MKT were claiming that the Commission's orders in Finance Docket No. 30,000 (Sub Nos. 18 and 25) mandated the use of their own crews in performing the trackage rights operations and were "demanding rights in excess of those granted by the Commission or with respect to which the Commission has jurisdiction." (JA 2). BLE pointed out to the ICC that the *N&W* protections imposed "do not require that D&RGW and MKT use their employees to operate trains over the involved trackage or even purport to treat with this subject." (JA 4). BLE noted that interpreting

the protections as mandating the use of D&RGW and MKT crews "would be contrary to the purposes of the Interstate Commerce Act" by leading to "payment of displacement and dismissal allowances to MP crews who would be needlessly affected by the transaction by the hiring of new employees to perform this work" and by payment of removal allowances to employees of D&RGW and MKT required to transfer, "thereby reducing the economics and efficiencies contemplated by the Commission's approval of these transactions." (JA 4). Moreover, BLE asserted that the Commission did not have jurisdiction over crew assignments and manning of positions, a holding that the Commission had historically applied in numerous previous decisions (JA 4).

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded: "The consolidation decision does not require clarification." (58a). To the Commission, BLE was "attempting to re-argue an issue that has already been decided." (*Id.*). In sum, the Commission held that it had jurisdiction of crew assignments and manning of positions and that it naturally followed that D&RGW and MKT could use their own crews.

On May 31, 1983, BLE filed with the ICC a "Petition for Reconsideration" of its May 18 order (JA 48-54). BLE stated that the Commission had "failed to consider its prior precedent on the issue which unequivocally hold that the subject of crew assignments and manning are labor disputes to be adjusted under the procedures of the Railway Labor Act." (JA 49). In addition, BLE contended that "the Commission's ruling contravenes Section 2 of Article I of the *New York Dock* protective conditions imposed by the Commission in this docket and thereby is

not in accord with the statutory mandate set forth in 49 U.S.C. 11347." (*Id.*).

Indicating the decision authorizing use of the lessee railroad's crews was contrary to the policy set forth in the Interstate Commerce and Railway Labor Acts, BLE made the following conclusion and prayer for relief:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act. (JA 54).

On June 7, 1983, the United Transportation Union also petitioned ICC for reconsideration of its May 18, 1983 order (JA 71-84). United Transportation Union asked the ICC to rule that its order had not relieved any railroads from their obligations under the Railway Labor Act or the conditions imposed to protect the interests of the railroad employees.

The Commission denied the petitions for reconsideration on October 25, 1983 (60a). The ICC held that it had jurisdiction under 49 U.S.C. §11341(a) to exempt a transaction approved under 49 U.S.C. §§11343 and 11344 from the provisions of the Railway Labor Act (64a-65a). Having found the power to exempt, the Commission then held that the exemption automatically flowed from its order:

> The terms of section 11341 immunizing an approved transaction from other laws are self-executing

and there is no need for us expressly to order or to declare that a carrier is expressly relieved from certain restraints. (66a).

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's orders of May 18, 1983 and October 25, 1983. Among other things, the unions argued in their petitions that the ICC exceeded its authority by exempting the carriers from the requirements of the Railway Labor Act in regard to crew selection and assignments and that this action contravened the employee protection requirements of 49 U.S.C. §11347 and the *N&W* conditions imposed in the ICC's approval of the trackage rights applications of D&RGW and MKT pursuant to Section 11347.

On May 3, 1985, the court of appeals in a 2-1 decision vacated the ICC's decision, stating:

> We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection. The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

---

[10]The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," id.: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act. (23a).

The dissent, on the other hand, accepted the Commission's argument that the exemption from the Railway Labor Act was self-imposed by reason of 49 U.S.C. §11341.

Subsequently, the Commission and the affected railroads petitioned for rehearing with suggestion for rehearing *en banc*. On July 12, 1985, the panel *sua sponte* amended its opinion so as to delete footnote 10 *supra*, and to modify the concluding paragraph of the majority opinion so as to remand the proceeding to the Commission. According to the majority of the panel of the Court of Appeals (Judges Wright and Mikva), the Railway Labor Act dispute resolution procedures may not be dispensed with by the ICC without an adequate finding of necessity for doing so, and the Commission had never given a reason for removing crew selection from the Railway Labor Act bargaining process (49a).

The petitions for rehearing and suggestions for rehearing *en banc* were denied by the court below in orders dated August 9, 1985 (52a-54a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION IS IN DIRECT CONFLICT WITH FEDERAL LABOR LAW AND THE POLICY EXPRESSED IN SECTION 11347, DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEALS

A.

In *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, ... U.S. ....., 104 S. Ct. 2778 (1984), this Court set forth the standard of review of an agency's interpretation of its governing statute.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In the instant case, both the Commission and the court of appeals disregarded the legislative history of 49 U.S.C. §11347. Although Section 11341(a) of Title 49 U.S.C. provides that the Commission's authority "under this subchapter is exclusive" and that a carrier "participating in a transaction approved by the Commission under this subchapter . . . is exempt from the anti-trust and from all other law . . . as necessary to let that person carry out the transaction," it begs credulity to believe that Congress intended the immediately following instructions in 49 U.S.C. §§11344(b)(1)(D) and 11347 to serve no purpose and to not mean what they say. Section 11344(b)(1)(D) directs the ICC to consider the interests of employees whenever it considers a control or trackage rights proposal. Section 11347 mandates that the Commission require "the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under

this section before February 5, 1976, *and the terms established under section 565 of title 45.*"[1] (Emphasis supplied). By reference to 45 U.S.C. §565 (1970), the Congress was incorporating the following substantive requirements for employee protection contained in Section 565(b):

> Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs.

In accordance with Section 565(b), the Secretary of Labor had fashioned a set of employee protections which included a requirement that the railroads preserve the Railway Labor Act rights of the affected employees and that those affected employees be given a voice in devising the procedure used to select the forces to perform the trackage rights operations. *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979). That language was adopted as Article I, Section 2 of the *New York Dock* and *N&W*

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1. The words providing that "the arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 of title 45" were added to former 49 U.S.C. §5 (2)(f) by Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 65). With certain minor modifications, this section was readopted by Congress on October 17, 1978, in the revised and recodified Interstate Commerce Act, as 49 U.S.C. §11347 (Pub. L. 95-473, 92 Stat. 1439).

conditions prescribed by the Commission in this case (Finance Docket No. 30,000), and reads:

> The rates of pay, *rules, working conditions and all collective bargaining and other rights, privileges and benefits* . . . of railroads' employees *under* applicable laws and/or *existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements* or applicable statutes. (Emphasis supplied).

As the unambiguous language of that provision commands, railroads involved in a transaction must implement it in a manner that will preserve the collective bargaining rights of employees, including their existing rates of pay, rules and working conditions, among which would be crew assignments and rights to man positions.

This Court in *Norfolk & Western Ry. Co. v. Nemitz,* 404 U.S. 37 (1971), held that a carrier and union could not substantially abrogate the levels of protections prescribed by the predecessor to 49 U.S.C. §11347. From the rationale therein, it necessarily follows that the Commission may not bypass the statutory protections to permit a carrier to accomplish the same result unilaterally.

In fact, until the instant case, the Commission has consistently interpreted the Act as placing all labor relations matters outside its jurisdiction or authority on the basis that such disputes are left to the processes of the Railway Labor Act.

In its report on remand in *Southern Ry. - Control - Central of Georgia Ry.,* 331 I.C.C. 151 (1967), the Commission addressed this issue in relationship to Section 5(11) of the Interstate Commerce Act, which has been recodified as Section 11341:

> The rights of railroad employees under their collective bargaining agreements . . . and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. . . . These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .
>
> . . . By its terms, section 5(11), applies only to antitrust and other restraints of law from carrying "into effect the transaction so approved * * *". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms. . . .
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . . (*Id.* at 169-170). (Emphasis in original).

Recognizing that it should not interject itself into labor relations, the ICC has consistently declined to select which

carrier's employees should operate the trains performing those operations stating: ". . . [T]he Commission [has] no jurisdiction to either impose crew assignment provisions or to remove said provisions. . . ." *Illinois Central Gulf R. Co. - Trackage Rights,* Finance Docket No. 28046 (unpublished) (served February 22, 1977) (JA 7-8). In *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co. and Missouri Pacific R. Co.,* Finance Docket Nos. 29733 and 29786 (unpublished) (June 10, 1982), on appeal to the United States Court of Appeals for the District of Columbia Circuit (Case No. 82-1944), the Commission held it "has no authority to involve itself" in "employee complaints" respecting work rights.

In *Leavens v. Burlington Northern,* 348 I.C.C. 962 (1977), a case involving an attack by an individual employee on protective conditions resulting from a merger protective agreement agreed to by the union and railroad pursuant to the forerunner of 49 U.S.C. §11347, the ICC said:

> The Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations. (*Id.* at 975).

In a concurring opinion, Commissioner Gresham described the ICC policy as grounded upon the fact that there is "no statutory basis for our intrusion in any way into the collective bargaining process." (*Id.* at 983).

Shortly prior to the instant case, the Commission denied an appeal by the BLE from the dismissal of its com-

plaint alleging that a carrier was operating over the tracks of another in violation of 49 U.S.C. §11343, thereby denying locomotive engineers of the owning railroad of their employment and other rights protected by 49 U.S.C. §11347. *Brotherhood of Locomotive Engineers v. Chicago & N.W. Transportation Co.*, 366 I.C.C. 859 (1983). Once again, the ICC said it is not responsible to resolve matters of this nature, such being left to other procedures, for "we lack the expertise to place ourselves into the field of collective bargaining or labor management relations." (*Id.* at 861). *See also Cairo Terminal R. Co. - Trackage Rights,* Finance Docket No. 30138 (unpublished) (May 5, 1983).

In contravention of the congressional policy and Commission precedent, the decision of the Commission and the court below permits the ICC to become directly involved in a labor relations matter and to allow that agency to relieve the involved carriers of their statutory and contractual obligations.

B.

The decision below conflicts with decisions of this Court. It is well held that a railroad may not unilaterally abrogate or alter rules and working conditions of its employees. *Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen,* 369 U.S. 142 (1969). In order to change the labor contract, the railroad must serve the notice required by Section 6 of the Railway Labor Act, 45 U.S.C. §156, and exhaust the negotiation and mediation procedures. The status quo that the parties are required to maintain during the bargaining process are the actual, objective working conditions, irrespective of whether those conditions are covered in the collective bargaining agreement. The entire scheme of the

Act is "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." (*Id.* at 148).

As the foregoing opinion establishes, the policy of encouraging collective bargaining, thereby granting railroad employees a voice in their employment life pervades the federal railroad labor relations law. Thus, in an earlier opinion, this Court held that the Norris-La Guardia Act, 29 U.S.C. §104, barred the issuance of an injunction against a railroad strike to enforce a Section 6 demand to amend the effective bargaining agreement by adding a provision that no existing position should be abolished without prior agreement. *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330 (1960). That decision arose out of the filings by the carrier with state public utility commissions to eliminate various stations, which would have resulted in loss of jobs for some station agents and telegraphers. The carrier refused to negotiate with the union on the ground that the request did not raise a bargainable issue under the Railway Labor Act and that the state commissions had the power to determine whether station agencies could be discontinued, which power could not be evaded by entering into a bargaining agreement. This Court found the legislative history and language of the legislation revealed a non-interventionist policy in labor disputes in order to promote freedom of association, organization, representation and negotiation on the part of workers (*Id.* at 336). Rejecting the argument that employees have "no collective voice to influence railroads to act in a way that will preserve [their] interests" (*id.*, 338), the Court opined that both the "Railway Labor Act and the Interstate Commerce Act

recognized that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." (*Id.* at 337).

With respect to the same issue now raised by the ICC's decision herein, the Court rejected the concept that the Interstate Commerce Act abrogates the right of the carrier's employees to negotiate on job security and stability:

> It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs. (*Id.* at 339-340).

In response to the carriers' argument that negotiations and possible continued operation of service and lines would be wasteful and contrary to the policy expressed in the Interstate Commerce Act to foster an efficient national railroad system, the Court said that "Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." (*Id.*, 342).

In sum, the decision of the Commission, and also that of the court below, impermissibly and seriously intrude on an area regulated by the Railway Labor Act, and undermines the policy furthering collective bargaining. The rationale exempting rail carriers from the procedures of

that Act allows applications to the ICC to replace the congressionally prescribed policy seeking industrial stability through the exercise of a voice by workmen in their industrial life.

C.

By remanding to the Commission to summarily supply a basis to exempt a carrier from its agreements on the ground that those provisions will impede the transaction, as the Commission has done in subsequent cases (*e.g. Maine Central R. Co., et al.*, Exemption from 49 U.S.C. §§11342 and 11343, Finance Docket No. 30532 (decided August 22, 1985), appeal pending in *RLEA v. United States*, Case No. 85-1636 (D.C. Cir.)), the decision of the court of appeals conflicts with the rulings entered by other circuits.

Article I, Section 2 of both the *N&W* and the *New York Dock* conditions requires that existing collective bargaining agreements between the employees and their carriers be maintained and preserved until changed by future bargaining agreements. In the instant case, the labor contracts through the railroad industry in general and the existing working conditions guarantee that all work performed on the lines of the UP and MP be performed by their employees. Thus, the work performed by UP and MP locomotive engineers may not be transferred to or contracted out to employees of another railroad or third party operator without exhausting the procedures of the Railway Labor Act.

In *St. Louis Southwestern Ry. Co. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), the carrier had entered into an employee protective agreement imposed by the Commission on the purchase of certain lines of the bankrupt

Chicago, Rock Island and Pacific Railroad Company. However, the railroad contracted signal work to another company, thereby depriving its employees of the right to perform work that they had previously performed. The union threatened to strike. The Tenth Circuit Court of Appeals held that the Railway Labor Act is all inclusive and preempts so that it leaves the railroad no room for contracting out work. Rather than considered exempt from the labor contract in force, the railroad was held to have violated Section 6 of the Railway Labor Act by unilaterally changing working conditions.

Moreover, the Fifth Circuit has clearly held that the term "transaction" used in 49 U.S.C. §§11341(a) and 11343(a) is, for exemption purposes limited to the transfer of the right to D&RGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. In *Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), that court of appeals in examining this question concluded that the immunity granted by what is now Section 11341(a) did not extend to those proposals before the ICC which dealt with the applicant carrier's intentions concerning rail labor. In so holding, the court relied upon the *terms of the statute* and upon prior Commission interpretations of its authority. *See also City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (Commission may nullify state law only when restraints *absolutely* prohibit a consolidation).

These cases establish that the Commission has not been given a license to eliminate contracts and to relieve rail carriers from their collective bargaining obligations. This callous and cavalier disregard of the employment

and seniority rights of the employees of an owning railroad has generated labor unrest and may very well threaten the success of trackage rights transactions.

These authorities also show that Section 11341 does not grant the ICC authority to determine who shall man the locomotives and to negate established collective bargaining agreements and that the authorized action violates the *N&W* conditions prescribed by the ICC and results in the unilateral change of working conditions for employees represented by BLE, all in contravention of the Railway Labor Act, and, as shown by the D&RGW example over the past several years, is unnecessary to enable the carriers to effectuate the trackage rights transactions.

II. THIS CASE PRESENTS AN IMPORTANT AND SUBSTANTIAL FEDERAL QUESTION REQUIRING THIS COURT TO EXERCISE ITS SUPERVISORY POWERS.

The amended holding of the court of appeals carries with it far-reaching implications which affect the national railway labor policy. Collective bargaining agreements in the railroad industry are entered into on the basis that they are subject to the interminably long and drawn out procedures of the Railway Labor Act before they may be changed. Moreover, as a result of the protections provided employees affected by a transaction in Section 11347 of the Interstate Commerce Act, the employees and their representatives anticipate that the rules, working conditions and other collective bargaining rights are preserved notwithstanding the Commission's approval of a financial transaction between railroads. In short, the employees have had a voice in crew assignments and the

manning of positions. Under the reasoning of the court below and the Commission, issues that go to the very heart of the collective bargaining relationship and the terms of those agreements may be dispensed with by a finding of necessity by the Commission, or, in the view of the ICC and the involved railroads, merely by the entry of an order of approval by the Commission.

The importance of the issue to the national railway labor policy is clear. If a rail carrier is automatically exempted from the Railway Labor Act and its labor contracts by the Commission's approval of a financial transaction, it will be relieved of a broad spectrum of collective bargaining rights and obligations based upon its financial interests vis-a-vis another rail carrier. By the simple expedient of filing an application for a financial transaction, the carrier's employees will lose their voice in the terms and conditions of their industrial lives.

The Commission's decision frustrates the purposes of industrial peace and predictability articulated in the Railway Labor Act. Allowing the rail carriers a self-executing exemption contravenes the national labor policy furthering collective bargaining as endorsed by Congress.

The Commission's decision also deprives the employees of both the lessor and tenant railroads and the union of the fruits of their bargaining over fundamental terms and conditions of employment, contrary to 49 U.S.C. §11347 and the policies and obligations of the Railway Labor Act.

As a direct corollary, the decisions of the Commission and the court below remove the basic underpinning of stable labor relations. The unilateral changes by rail carriers involved in various transactions have led to numerous lawsuits throughout the United States in which

the railroad employees claim that the Railway Labor Act procedures must be followed before changes in working conditions (*i.e.*, crew assignments and manning of positions) can be effected. *See, e.g., RLEA v. Butte Anaconda and Pacific Ry. Co.*, No. 85-3875 (9th Cir.); *RLEA v. Staten Island R. Co.*, No. 85-7483 (2d Cir.); *RLEA v. Soo Line R. Co. and Milwaukee Road*, No. 85-7583 (U.S.D.C. N.D. Ill.); *Int'l Ass'n of Machinists and Aerospace Workers v. Boston & Maine Corp.*, No. 84-3703-T (U.S.D.C. Mass.).

In sum, the decision of the Commission that its approval of a transaction automatically exempts carriers from the Railway Labor Act procedures impermissibly and seriously intrudes on an area regulated by federal labor law and undermines important policies embodied therein. Although the holding of the District of Columbia Circuit would appear to limit the self-executing nature of that exemption by requiring the ICC to make a finding that following the Railway Labor Act procedures will serve as an impediment to the transaction, the result has been no different in subsequent cases before the Commission for that agency finds that preservation of existing rules and working conditions and application of the Railway Labor Act procedures automatically hinder the carriers and the financial transaction they wish to make. *See Maine Central Railroad Co. et al.*—Exemption from 49 U.S.C. §§11342 and 11343, Finance Docket No. 30532 (decided August 22, 1985), appeal pending in *RLEA v. United States and Interstate Commerce Commission*, No. 85-1636 (D.C. Cir.).

Accordingly, a great deal of uncertainty faces employees in the railroad industry, and only this Court through the exercise of its general supervisory powers can at this time bring a measure of stability to labor relations in the railroad industry.

CONCLUSION

For the foregoing reasons, this Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

(Decided May 3, 1985)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, *et al.*, INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, *et al.*, INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

Argued December 4, 1984

Harold A. Ross, with whom *Gordon P. MacDougall* was on the brief, for petitioner in No. 83-2290.

John O'B. Clarke, Jr., for petitioner in No. 83-2317.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *Robert S. Burk,* Acting General Counsel, and *Henri F. Rush,* Associate General Counsel, Interstate Commerce Commission, *J. Paul McGrath,* Assistant Attorney General, and *John J. Powers, III* and *Frederic Freilicher,* Attorneys, Department of Justice, were on the brief, for respondents.

John H. Caldwell, Denise M. O'Brien, and *Kendall T. Sanford* were on the brief for intervenor Denver & Rio Grande Western Railroad Company.

James M. Verner, Ronald B. Natalie, Joseph L. Manson, III, and *Michael E. Roper* were on the brief for intervenor Missouri-Kansas-Texas Railroad Company. *William C. Evans* entered an appearance for that intervenor.

James V. Dolan, Nina K. Wuestling, Charles A. Miller, and *Gregg H. Levy* were on the brief for intervenors Union Pacific Railroad Company and Missouri Pacific Railroad Company.

Before WRIGHT and MIKVA, *Circuit Judges,* and MACKINNON, *Senior Circuit Judge.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Senior Circuit Judge* MACKINNON.

WRIGHT, *Circuit Judge:* Two unions—the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—object to the Interstate Commerce Commission's interpretation of labor issues arising from ICC's approval of a railroad consolidation.

The unions claim that, when the dust settled from the consolidation, certain railroads had effectively squeezed them out of their previous role in determining the crews used on particular routes. At the time, in early 1983, the unions objected and argued that the railroads' actions violated statutory labor protections. Since the railroads responded that ICC had given them full crew selection rights in the consolidation approval, the unions appealed to ICC for an order clarifying that its general consolidation approval did not affect previous labor arrangements, including crew selection rights.

In two decisions ICC rejected the unions' arguments. It maintained that the railroads' intentions on crew selection had been clear in the consolidation as approved and that ICC's authority to exempt transactions from legal obstacles, 49 U.S.C. § 11341(a) (1982), immunized these crew selection prerogatives from later attack.

The unions now petition this court to vacate those ICC decisions. Four railroads—the Denver & Rio Grande Western (D&RGW), the Missouri-Kansas-Texas (MKT), the Missouri Pacific (MP), and the Union Pacific (UP)—are intervening in support of the Commission.

Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions.

I. Background

A. *Legal Framework*

This case presents the intersection of two statutory mandates—ICC's exclusive authority to approve rail consolidations under the Interstate Commerce Act and the statutory protection for rail labor employees under both

the Railway Labor Act and the Interstate Commerce Act. The unions argue that (1) ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act approval authority, and (2) ICC *cannot* waive the Interstate Commerce Act's labor protection conditions in the exercise of that approval authority. Ultimately, we find the Railway Labor Act argument dispositive, and we vacate the ICC decisions on that basis. To fully understand the texture of this dispute, however, it is necessary to examine the Interstate Commerce Act labor protection conditions as well.

1. *ICC's approval authority.* Under the Interstate Commerce Act, ICC has exclusive authority to approve certain consolidations and mergers. 49 U.S.C. § 11341 *et seq.* (1982). The Act enumerates the types of transactions to which ICC's approval authority applies, *id.* § 11343, and the considerations that must guide ICC, *id.* § 11344. Most significantly for this appeal, "[a] carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Id.* § 11341(a). Thus ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.

In the exercise of this authority to exempt consolidations from the constraints of applicable statutes, ICC has certain ultimate constraints on its broad authority. First, there is a necessity component to the plenary authority: the statute specifies that ICC may exempt transactions from applicable laws *"as necessary"* for completion of the transaction. Second, as with any agency action, ICC's

exercise of its authority must comport with the requirements of reasoned decisionmaking. *See generally United States v. ICC*, 396 U.S. 491 (1970).

2. *Labor protection requirements.* Statutory protections for railroad employees have received considerable congressional attention. Two important statutory vehicles for the current labor protection requirements are the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982), and the Interstate Commerce Act's labor protection section, 49 U.S.C. § 11347.

The Railway Labor Act creates a highly structured system for administering and resolving labor disputes. In passing the Railway Labor Act Congress sought, in part, "[t]o avoid any interruption to commerce * * *, to forbid any limitation upon freedom of association among employees * * *, [and] to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions[.]" 45 U.S.C. § 151a. The statute specifies eleven general duties of rail carriers, *id.* § 152. It also creates a variety of mechanisms to settle rail labor disputes—a National Railroad Adjustment Board, *id.* § 153, a National Mediation Board, *id.* §§ 154-155, and a system of arbitration, *id.* §§ 157-159. The statute gives special attention to changes in rates of pay, rules, and working conditions. It provides that employers give employees the opportunity for negotiation and mediation before implementing such changes. *Id.* § 156; *see also id.* § 152, Seventh duty. The Railway Labor Act thus stands as an important structure for maintaining labor peace and fairness.

The Interstate Commerce Act labor protection section, 49 U.S.C. § 11347, affords employees substantial protection from the effects of mergers and consolidations. Such labor protection conditions have a long history. *See New*

York Dock Railway v. ICC, 609 F.2d 83, 86-90 (2d Cir. 1979). In its current version the section provides that, in the exercise of its approval authority, "the Interstate Commerce Commission *shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976 * * *." 49 U.S.C. § 11347 (emphasis added).

ICC has specified the particular conditions that must be observed for this Section 11347 requirement. The conditions for protecting labor in a *merger* are known as *New York Dock* conditions, *see New York Dock Railway*, 360 ICC 60 (1979), *aff'd sub nom. New York Dock Railway v. ICC, supra.* The conditions for protecting labor in *transfers of trackage rights* are known as *Norfolk & Western* conditions, *see Norfolk & Western Railway Co.*, 354 ICC 605 (1978), *modified by Mendocino Coast Railway, Inc.*, 360 ICC 653, 664 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions include negotiation and mediation for dismissal and displacement of employees, 354 ICC at 610-611, 360 ICC at 85; dismissal and displacement compensation, 354 ICC at 611-612, 360 ICC at 86; and a system of arbitration, 354 ICC at 613, 360 ICC at 87-88. Generally, the conditions provide that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." 354 ICC at 610, 360 ICC at 84. ICC has thus established conditions for discharging its statutory responsibility to protect labor benefits in the midst of consolidations.

In short, ICC has authority to approve certain transactions, even to the extent of exempting the transactions from other laws. At the same time, the Railway Labor Act structures rail labor relations, and the Interstate Commerce Act's labor protection section gives rail employees a measure of protection from the effects of rail transactions.

B. *The Current Dispute*

This dispute has three important stages: (1) ICC's consolidation approval in 1982; (2) the post-approval conflict over crew selection; and (3) the two ICC decisions in 1983.

1. *ICC approval for the consolidation.* In 1982 UP and MP applied to ICC for approval of a consolidation under ICC's exclusive authority.[1] Several railroads and several unions (including the petitioners) objected to the proposed consolidation. On October 20, 1982 ICC approved the consolidation, but it also approved the application of two railroads for "trackage rights"[2] over specified MP routes to ameliorate possible anticompetitive effects. D&RGW received trackage rights for one route (Pueblo, Colorado to Kansas City, Missouri), and MKT received trackage rights for several other routes. *See Union Pacific-Control-Missouri Pacific*, 366 ICC 459 (1982), *affirmed in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d

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1. Western Pacific Railroad Company was also involved in the consolidation, but its role is not relevant to these petitions.

2. "Trackage rights" give one railroad the right to run its trains over another railroad's tracks. Indisputably, trackage rights are " 'subject to * * * specific negotiations,' " dissent at 18. They are also subject to governing statutes and to the conditions of the Commission's approval, including the imposition of general labor protection conditions.

708 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, 53 USLW 3597 (Feb. 19, 1985). These are the four railroads who are intervening in support of the ICC decisions—the two who received ICC approval of their consolidation (UP and MP) and the two who received trackage rights for MP routes as conditions of that approval (D&RGW and MKT).

In their applications for trackage rights D&RGW and MKT both commented on crew selection. D&RGW specified that it could at its option use its own crews when it used the newly granted trackage rights, Finance Docket No. 30,000 (Sub-No. 18) (D&RGW-8) (*cited in* ICC Decision of October 25, 1983, Joint Appendix (JA) 164); MKT specified that it *would* use its own crews, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25) (*cited in* ICC Decision of October 25, 1983, JA 164).

In granting the trackage rights ICC did not mention crew selection. The Commission primarily addressed the need for the trackage rights to prevent possible anticompetitive effects from the consolidation. 366 ICC at 566-568, 572-578. Indeed, the Commission denied part of MKT's application for trackage rights because it did not agree that these trackage rights were needed to promote competition. *Id.* at 570-572. Notably, ICC emphasized that its general trackage rights approval was subject to the *Norfolk & Western* conditions that protect workers' rights in trackage rights situations. 366 ICC at 654; *id.* at 621-622. This statement was ICC's only reference to labor arrangements in the use of trackage rights.

2. *The crew assignment controversy.* After the consolidation became effective, the railroads began performing their approved trackage rights operations. D&RGW temporarily used MP crews on the MP routes, but

claimed that it would soon use its own crews. Exhibit A to BLE's Petition for Clarification of ICC's October 20, 1982 decision, JA 6. MKT, meanwhile, began using its own crews. UTU's Petition for Reconsideration of ICC's denial of BLE's Petition for Clarification at 3, JA 74. The unions objected. They claimed that the unions representing MP employees had an established right to a role in crew assignment and that the railroads were changing that condition without consulting them. Both D&RGW and MKT, however, claimed that the ICC approval of their applications gave them a right to use their own crews and that ICC's exemption authority immunized this right from later legal challenge. MP's Reply to BLE's Petition for Clarification at 11, JA 24; UTU's Petition for Reconsideration at 3-4, JA 74-75.

D&RGW also made an additional argument. The Atchison, Topeka, & Santa Fe Railway Company had challenged D&RGW's temporary use of MP crews in the trackage rights as anticompetitive and impermissible. On November 24, 1982 and January 18, 1983 ICC issued decisions rejecting the challenge and upholding D&RGW's plans, including the preliminary decision to use existing MP crews. The Commission noted that D&RGW had the choice of using its own crews; the Commission did not mention any lurking labor relations issues. ICC Decision, November 24, 1982, at 3 (D&RGW brief, Appendix B); ICC Decision, January 18, 1983, at 3 (*id.*, Appendix C). In response to the unions' challenge, D&RGW claimed that these ICC decisions settled the validity of its crew selection plans. Reply of D&RGW to BLE's Petition for Clarification, JA 9-10.

Initially, the two unions responded to the railroads' position on crew selection in different ways. The United Transportation Union threatened to strike over the crew

assignment issue. MP sought an injunction preventing the threatened strike. On March 1, 1984 the District Court for the Eastern District of Missouri issued such an injunction. *Missouri Pacific R. Co. v. United Transportation Union,* 580 F.Supp. 1490 (E.D. Mo. 1984). An appeal from that injunction is pending.

The Brotherhood of Locomotive Engineers took a different tack. On April 4, 1983 it filed a petition with the Commission and requested clarification that the consolidation approval did not alter previous labor arrangements, particularly with respect to crew selection. BLE claimed that the normal Railway Labor Act and Interstate Commerce Act labor protection conditions (§ 11347) should apply. BLE's Petition for Clarification, JA 2-4. After ICC rejected BLE's interpretation in a May 18, 1983 decision, UTU joined BLE in a May 31 petition requesting reconsideration. On October 25, 1983 the Commission elaborated on its earlier decision and continued to reject the union's contentions.

3. *The ICC decisions.* In its May 18 decision refusing BLE's request, ICC maintained that it had already decided the issue of crew selection. The Commission claimed that it had exempted the crew selection provisions, which it had not mentioned in its decision, from all legal obstacles because those provisions were in the trackage rights applications. "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. * * * We have broad authority to impose conditions on consolidation and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews." ICC Decision of May 18, 1983 at 4-5, JA 36-37. ICC did not specifically address the Railway

Labor Act and Section 11347 arguments. Thus in its May decision ICC implied that it had immunized the crew selection prerogatives from legal obstacles by dint of having approved the trackage applications.

In its October decision the Commission again denied the unions' request. It rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary to the transaction. "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983 at 7, JA 163. The Commission similarly rejected the claim that Section 11347 rights were being violated. "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transactions." *Id.* at 6, JA 162. The Commission thus continued to maintain that it had immunized the crew selection from all subsequent legal obstacles, and it continued to offer no analysis of the necessity of this immunity for completion of the transaction.

The unions filed petitions to this court. They claim that ICC exceeded its authority by unjustifiably waiving the Railway Labor Act and the Interstate Commerce Act labor protection conditions.

II. Threshold Issues

Before reaching the statutory issues, we must consider two threshold issues: timeliness and issue preclusion.

A. *Timeliness*

ICC and the four intervening railroads argue that the unions are barred because their appeal is not timely. We disagree.

The timeliness dispute turns on the interpretation to be given various Commission actions. The jurisdictional statute permits judicial review if an appeal of a final order is filed within 60 days. 28 U.S.C. § 2344 (1982). The railroads and ICC contend that ICC's final order on crew selection prerogatives issued on October 20, 1982 (the decision giving general approval for the UP/MP consolidation, subject to the grant of trackage rights to D&RGW and MKT). They argue that the unions' appeals for clarification in April 1983 (resulting in the May 1983 decision) and May 1983 (resulting in the October 1983 decision) are entitled to no weight because those ICC decisions were merely procedural refusals to reopen a matter decided in the October 1982 order.

The railroads and ICC rely heavily on *Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir. 1984) (*per curiam*). In that case the court ruled that a petition for review was not timely when petitioner took no action during the statutory time period of 30 days, asked the agency to reconsider two months after the decision, and sought to invoke the court's jurisdiction by filing a petition for judicial review within 30 days after the agency denied the petition for reconsideration. The railroads and ICC argue that, similarly, in the case on appeal, the unions seek to make their petition timely by dating the time period for judicial review only from the procedural refusal to reopen a previous proceeding.

Their reliance on *Davis* is misplaced. As this court observed some time ago in *Investment Company Institute*

v. Board of Gov. of FRS, 551 F.2d 1270, 1281-1282 (D.C. Cir. 1977), and very recently in *Eagle-Picher Industries, Inc. v. EPA*, ... F.2d ....., ... (D.C. Cir. No. 83-2259, decided April 16, 1985) (slip op. of Edwards, J. at 13-19), time limits on review may, in exceptional circumstances, be "excused" when an issue is not ripe for review during the statutory period. As we emphasized in *Eagle-Picher*, petitioners generally are obliged to seek judicial determination of the *ripeness* of their claims during the statutory period. "In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim." ..... F.2d at ....., slip op. at 6. However, we specifically noted that "[e]xceptions occasionally may be justified in the light of changed circumstances giving rise to a new cause of action beyond the statutory period for review; compelling case precedent that makes it clear beyond doubt that the claim was not ripe during the statutory period; or clear evidence that a failure to consider a petitioner's claims would work a manifest injustice." *Id.*

The instant case clearly presents a situation in which the petitioners' claim ripened after the expiration of the statutory period due to changed circumstances resulting from a misleading statement of position by ICC. The petitioners had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof. In its initial decision, the ICC specifically said that the statutory labor protection conditions would apply and, thus, it would have been premature for the unions to have claimed that the conditions were being violated. The Commission and the railroads argue that the trackage applications specifically noted that

D&RGW *might*, and MKT *would*, use their own crews, and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions. The issue did not become ripe for judicial review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements.[3]

Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May decision. For the Commission then undertook extensive review and issued a lengthy opinion in October. If the motion for reconsideration is filed within the statutorily prescribed review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Davis, supra*, 735 F.2d at 1391 n.5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, *see Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n.17 (D.C. Cir. 1982).

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3. The dissent's extended timeliness objection rests on a single mistaken assumption: "Though these labor protections were held to be applicable in general, * * * they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission." Dissent at 3. Unfortunately, not one word of ICC's October 1982 decision suggested that its unequivocal commitment to labor protection conditions was somehow "inapplicable to the crew selection issue." From all appearances, ICC's imposition of labor protection conditions qualified its approval of the crew selection applications, rather than the reverse. Therein lies the nub of this case and the reason why petitioners' claim was, in fact, not ripe until ICC modified that earlier commitment in the proceedings at issue.

The railroads and the Commission also claim that the petition should be barred as untimely because ICC clarified its policy on crew assignment in decisions issued on November 24, 1982 and January 18, 1983. At that time D&RGW had not exercised its option to use its own crews; the Atchison, Topeka & Santa Fe Railway was protesting its use of MP crews as anticompetitive. In its decisions ICC noted that D&RGW had the option of using its own crews. The argument that this statement should have put the unions on notice is unconvincing: nothing suggested that ICC had changed its view that the general labor protection conditions would apply in full force. The dispute is not over whether the railroads could use their own crews; it is whether they could use their own crews subject to the requirements of the labor protection conditions. Before May 1983 the Commission never suggested that D&RGW and MKT could use their own crews *without* observing the basic labor protection conditions. And before the railroads refused to negotiate in early 1983 the unions had no reason to appeal to the Commission for clarification. Thus the November 1982 and January 1983 decisions should not stand as a bar: although those decisions suggested that the railroads could use their own crews, ICC did not suggest that they could do so without observing the basic labor protection conditions.

Finally, pointing to the principle that parties should raise their objections in administrative proceedings, *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33 (1952), the railroads and ICC claim that the unions should have raised their objection in the October 1982 proceeding. However, in the administrative proceedings the unions did argue for vigorous labor protections, 366 ICC at 621-622. As discussed, it was not until the May decision that

the unions should have realized that the labor protection conditions would not be fully applicable to crew selection.

B. *Issue Preclusion*

MKT raises an additional threshold objection. It claims that the crew selection issues were decided in the opinion accompanying the Missouri District Court's injunction prohibiting UTU from striking, *see Missouri Pacific R. Co. v. United Transportation Union, supra,* 580 F. Supp. 1490, *appeal pending,* and that issue preclusion prevents this court from reaching the issues. This argument is frivolous. Despite broad dicta, the District Court recognized that it had no power to consider the validity of ICC orders. *See id.* at 1502 ("The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC."). Thus there can be no preclusive effects on this court's review of the validity of the ICC order. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4420 (1981) ("The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to matters that have been actually decided.").

We thus reject the threshold objections and turn to the merits of the unions' contentions.

III. STATUTORY ISSUES

The unions raise two statutory arguments: (1) ICC offered no inkling of a justification for the view that waiving the Railway Labor Act with respect to crew assignment was necessary to effectuate the transaction, and (2) the Interstate Commerce Act labor protection conditions (49 U.S.C. § 11347) may not be waived because the labor protection section specifically qualifies ICC's con-

solidation approval authority (49 U.S.C. § 11341). We find the first argument decisive.

The unions claim that ICC has wholly failed to justify the necessity for waiving the Railway Labor Act's applicability to the crew selection issue. The Commission claims that no such justification is necessary.

Although an agency receives deference in interpreting its organic statute, the agency's authority is not unbounded. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, ... U.S. ....., ... & n.8, 104 S.Ct. 439, 444 & n.8 (1983). In reviewing an agency's interpretation we must consider whether it is within the delegation to the agency envisioned by Congress. *State of Montana v. Clark*, 749 F.2d 740, 744-747 (D.C. Cir. 1984). Our analysis must begin with the language of Congress. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, ... U.S. ....., ..., 104 S.Ct. 2778, 2782 (1984).

The statutory language dictates that the Commission's exemption authority applies only "as necessary" to allow transactions to occur. 49 U.S.C. § 11341(a). Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.

This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand

to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.[4]

This necessity component of ICC's waiver authority has not frequently arisen in the case law. In part this is because, in many of the ICC waiver authority cases, the necessity for the waiver is clear; the battle is fought over whether the waiver and transaction are in the public interest. *See, e.g., United States v. ICC, supra,* 396 U.S. 491. However, ample precedent supports the view that the Commission must supply some basis for a necessity determination before the exemption authority applies. In one line of cases the Supreme Court has assumed that ICC may waive state laws only if those state laws pose an obstacle to the transaction. *See Callaway v. Benton,* 336 U.S. 132, 140-141 (1949) (waiver authority applies to "state laws interposing obstacles in the path of otherwise lawful plans of reorganization"); *Seaboard Air Line R. Co. v. Daniel,* 333 U.S. 118, 126 (1948); *Texas v. United States,* 292 U.S. 522, 534-535 (1934).[5]

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4. This is not to say that the ICC must enumerate every legal obstacle that is waived in its approval. Such a requirement might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system," *County of Marin v. United States,* 356 U.S. 412, 416 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But ICC's decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

5. *Schwabacher v. United States,* 334 U.S. 182 (1948), also supports this analysis. As the Fifth Circuit has explained, "In *Schwabacher* * * * the insistence of further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger. In each of these [Supreme Court] cases the voided state-related provision impinged upon the effectuation of the transaction. * * * In *all* of the cases approving the ICC's nullifications of state law, *the laws stood in the way of the approved transaction.*" *City of Palestine, Texas v. United States,* 559 F.2d 408, 414-415 (5th Cir. 1977) (emphasis added), *cert. denied,* 435 U.S. 950 (1978).

Furthermore, the Supreme Court has stressed that the words of ICC's approval authority section must be carefully scrutinized to ensure that ICC does not exceed its statutory powers, *County of Marin v. United States*, 356 U.S. 412 (1958), and that ICC's approval authority, though broad, is ultimately reviewable as an exercise of reasoned decisionmaking. *See United States v. ICC, supra; Seaboard Air Line R. Co. v. United States*, 382 U.S. 154 (1965); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173 (1959); *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

Other courts have also emphasized that there must be a basis in the record for the conclusion that the statutory waiver is necessary to the transaction. In *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), the Fifth Circuit provided an extensive analysis of this necessity problem. In vacating ICC's determination that it had waived certain contractual obligations the court stressed: "The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved * * * transaction. In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency *unless those laws or contracts interfered with carrying out an approved merger.*" *Id.* at 414 (emphasis added). Similarly, in an earlier case the Fifth Circuit noted that ICC approval of a carrier's plans did not automatically remove the requirements of the Railway Labor Act and the Norris-LaGuardia Act. *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). *See also Interstate Investors, Inc. v. Transcontinental Bus System, Inc.*, 310 F.Supp. 1053, 1068 (S.D. N.Y.

1970) (court must determine whether waiver of anti-trust laws is "necessary" to completion of transaction).[6]

With these principles in mind, the current dispute comes clearly into focus. ICC claims that the Railway Labor Act was a "law" appropriately waived in the exercise of its exclusive authority. ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually nonexistent, both in the 1982 decision and in the 1983 decisions. In the 1982 decision ICC never offered a word about waiving the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so. As noted, it merely approved the trackage applications and specified that the labor protection conditions applied in full. In the 1983 decisions ICC continued to give no necessity justification for the waiver of the Railway Labor Act. It claimed that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain

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6. ICC relies on *Bhd of Locomotive Engineers v. Chicago & Northwestern R. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to support its position. In that case the Eighth Circuit affirmed an ICC order approving a railroad-union labor agreement and specified that the Railway Labor Act would not apply. The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). 314 F.2d at 433. And third, *C&NW* was explicitly limited to its facts. *Id.* at 434. *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find that interpretation ill-conceived and reject it.

restraints." ICC Decision of October 25, 1983, JA 163. In its proceedings, then, the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act.[7]

ICC's complete failure to justify the necessity for waiving the Railway Labor Act respecting crew selection is especially conspicuous in light of evidence suggesting that the issue would *not* interfere with the trackage rights. First, the Commission specifically left the question of trackage compensation open to later negotiation between the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally,

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7. ICC points to its October decision statement that "[t]he approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement," ICC Decision of Oct. 25, 1983 at 15, JA 171. It then claims that this reference to "material terms" provides a sufficient basis for immunity because crew selection was a "material term" of the trackage rights transaction. However, merely stating in totally conclusory terms that something is a "material term" is inadequate to provide the basis for the conclusion that waiver is necessary to fruition of the transaction, as § 11341(a) requires. We do not, as the dissent suggests, "attempt[] to disregard" this statement. Dissent at 19. Rather, we search in vain for the articulated, rational explanation of this purported finding that elementary principles of reasoned decisionmaking clearly demand. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.[8]

In short, ICC has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.[9]

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8. The dissent's vehement protestations about the "pro-competitive purpose" of the trackage rights approval are wide of the mark. For the question is whether the issue of *crew selection* somehow goes to that "pro-competitive purpose." ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived. Indeed, as discussed above, the evidence in the record indicates otherwise.

9. The unions have argued that the Railway Labor Act and § 11347 rights are largely coextensive in this case, and we thus

(Continued on following page)

We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection. The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

So ordered.

MACKINNON, *Senior Circuit Judge* (dissenting): This case involves the consolidation of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("Missouri Pacific"), and the Western Pacific Railroad Company ("WP"), thus forming one of the nation's largest railroads. In an October 20, 1982 decision, the ICC granted specified trackage rights, over two sections of the Missouri-Pacific lines, to two railroads that would be harmed by the consolidation, the Missouri-Kansas-Texas Railroad Company ("Katy") and the Denver and Rio Grande Western Railroad Company

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Footnote continued—

view the Railway Labor Act argument as dispositive. To the extent that there is a meaningful difference between the Railway Labor Act and § 11347 protections, the unions have not argued it, and we need not address the issue. In any event, we note that our decision vacates the ICC decisions in their entirety.

10. The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," *id.*: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act.

("Rio Grande"). The Commission authorized these two railroads to use their own crews to operate their own trains while exercising such trackage rights. My colleagues rule that the Commission has failed to find that it was "necessary" to the approval of the trackage rights applications and the underlying Union Pacific-Missouri Pacific-Western Pacific consolidation to waive any applicable protective labor conditions. In my view, the majority has ignored the clear import of the record and, in a decision that pays lip service to our prescribed standard of review, substituted its judgment for that of the ICC. I therefore respectfully dissent.

I.

The majority holds first that the claims of the petitioning unions are not barred for being untimely because the October 20, 1982 ICC decision was not final and thus did not make the issue of crew selection ripe for review. I cannot agree with the majority's analysis.

This case began on September 15, 1980, when the UP, the Missouri Pacific, and the WP filed jointly for approval to consolidate. After the application was made public, 45 Fed. Reg. 68484 (1980), various parties entered the fray either to support or oppose the application. On January 13, 1981, the Katy and the Rio Grande opposed the consolidation and filed separate applications seeking protective trackage rights and other compensatory rights they alleged were necessary in order both to ameliorate the anticompetitive harms of the proposed consolidations and to protect them from revenue losses necessary to continue essential services.

The Katy sought trackage rights to operate over Missouri Pacific's tracks between Kansas City, Kansas,

and Omaha, Nebraska, a distance of approximately 200 miles. The proposed operating agreement, as submitted to the ICC for approval, specified the operating conditions for the joint trackage rights and specifically stated:

> MKT [Katy], *with its own employees,* and at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track.

Finance Doc. No. 30,000 (Sub-No. 25) 1, Exh. No. 2 at 5 (emphasis added). The Rio Grande was harmed by the merger both at the Utah and the Pueblo, Colorado gateways. It sought joint trackage rights to operate over Missouri Pacific's tracks between Pueblo, Colorado, and Kansas City, Missouri, a distance of 619 miles. Its trackage rights application submitted for ICC approval stated:

> Rio Grande *may, at its option, elect to employ its own crews* for the movement of its trains, locomotives and cars to points on or over the Joint Track.

Id. (Sub-No. 18), Rio Grande Proposed Agreement § 6 (c)(3) (emphasis added). Thus, both railroads *expressly* requested ICC authority to use their own crews while operating their own "trains, locomotives and cars" over joint trackage with the Missouri Pacific.

On February 20, 1981, the Katy and the Rio Grande filed verified statements with the ICC in support of their applications for joint trackage rights. These statements indicated further that if the trackage rights were granted, the railroads would use their own crews. Verified Statements of Adolf Nance and Harold Hacker, quoted in J.A. at 165. In ruling on the applications, the *implicit issue* for the ICC was the degree of anticompetitive harm to which the Katy and Rio Grande would be subjected and accordingly what amount of compensatory

rights would be *necessary* to protect the liability of the applicant railroads and to guarantee that they would furnish the necessary competition to the merged railroads. The petitioning unions, the Brotherhood of Locomotive Engineers ("Engineers" or "union") and the United Transportation Union ("UTU" or "union"), participated in the ICC proceedings and submitted evidence in opposition to the joint trackage rights applications. Hearings proceeded for eleven months, ending in January, 1982. There is no indication, however, that petitioners ever contended that UP or Missouri Pacific employees had a right to participate in the crew selection decision.

On October 20, 1982, the ICC approved the consolidation of the UP, the Missouri Pacific, and the Western Pacific and made the consolidation subject to the usual labor protective conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal,* 360 I.C.C. 60 (1979). As part of the consolidation, while disapproving other requested compensatory conditions, the ICC specifically approved the applications of the Katy and the Rio Grande for the trackage rights described above, subject to the labor protection conditions specified in *Norfolk & Western Ry. Co.—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 665 (1980). *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R. Co.—Control—Missouri Pacific Corp. and Missouri Pacific R.R. Co.,* 360 I.C.C. 459, 654 (1982). Though these labor protections were held to be applicable in general, I think it is clear that they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission. Moreover, unlike other trackage rights-re-

lated requests by the Katy and Rio Grande which the Commission denied, *see* Majority Opinion at 20-21, there was no express denial of the crew selection requests. Therefore, the labor unions were on notice that the ICC had authorized the Katy and the Rio Grande to use their own crews in the operation of their own trains in the exercise of their joint trackage rights.

It was not until April 4, 1983, approximately five and one-half months after the ICC's decision approving the consolidation, that the Engineers filed a petition with the ICC seeking clarification of the October 20, 1982 decision. The ICC denied the Engineers' petition on the procedural grounds that crew selection had been an issue in the consolidation proceedings, that petitioners introduced no new evidence or arguments setting forth any issue in need of clarification, and that the issues involved had been decided in the Commission's October 20, 1982 decision. Following this denial, the UTU joined the Engineers in moving for reconsideration of the denial of the motion for clarification.

Time deadlines for requesting review of agency decisions are *jurisdictional* and cannot be enlarged by a reviewing court. *National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981); *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 388-89 (D.C. Cir. 1974). The Hobbs Act prescribes that judicial review must be sought within 60 days of a final order. 28 U.S.C. § 2344 (1982). An action of the Commission is final on the date on which it is served, and exhaustion of further administrative remedies is not required. 49 U.S.C. § 10327(i) (Supp. V 1981). The Commission's decision here was served on October 20, 1982. In this case, then, the statutory time period expired December 20, 1982. No judicial review was sought before that date.

We have also recognized that a party who had the opportunity to participate in the underlying proceedings is a party "aggrieved" under 28 U.S.C. § 2344. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). Yet I find no indication in the record or briefs that the Engineers or the UTU ever objected to the proposed crew provisions on the grounds that labor protections would be violated by granting them. Whatever caused petitioners not to seek timely review, it was not any ambiguity in the ICC decision of October 20, 1982. Petitioners plainly slept on whatever rights that they contend they possessed.

Determined to reach the contentions raised by this petition, however my colleagues accept the labor unions' argument that the crew selection issue was not ripe for review when the ICC served its decision. Petitioners contend that the issue was not ripe because the ICC's general pronouncement that the *New York Dock* and *Norfolk* labor protection provisions would apply somehow nullified the *express* statements in the applications regarding crew selection. The unions claim that they petitioned for clarification of the October 1982 decision as soon as it became apparent that the railroads intended to use their own crews, *i.e.*, when the railroads began to file their trackage rights agreements with the ICC. Brief of BLE at 8-9.[1] This claim should not be accepted as extending the time to appeal. The railroads at that time were doing nothing more than exercising the rights clearly granted them by the October 20, 1982 decision. The unions had been on notice since the day the applications for trackage rights

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1. This contention imposes on the credulity of the court. The unions, if they ever looked at the applications of the Katy or the Rio Grande, and with their interest and the competency of their lawyers they must be presumed to have done so, must have known perfectly well that if trackage rights were granted the applicants intended to use their own crews.

were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved. The ICC's October 1982 decision approved those applications and authorized the use of the applicant's own crews in the operation of their own trains.

Moreover, I find the majority's analysis particularly difficult to swallow in light of *Eagle-Picher Industries, Inc. v. EPA*, No. 83-2259 slip op. (D.C. Cir. Apr. 16, 1985) (Opinion by Edwards, J.). In *Eagle-Picher* this court emphasized that "[a]s a general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Id.* at 17. "Consequently," this court concluded,

> except where events occur or information becomes available after the statutory review period expires that essentially creates a challenge *that did not previously exist* [emphasis added], or where a petitioner's claim is, under our precedents, *indisputably* not ripe until the agency takes further action, we will be very reluctant, in order to save a late petitioner from the strictures of a timeliness requirement, to engage in a retrospective determination of whether we would have held the claim ripe had it been brought on time.

Id. at 17-18. Under the *Eagle-Picher* analysis, at best petitioners must be said to have entertained "some" doubt about the ripeness of their claims. At worst, later occurrences did not create a challenge "that did not previously exist," nor were petitioners' claims "*indisputably* not ripe."

By this appeal petitioners plainly attempt to convert a petition to reconsider the denial of a motion for clarification into a challenge of a final decision by the ICC that granted the Katy and the Rio Grande the *right* to crew their own trains over joint trackage with the Missouri Pacific. Because the motion to clarify was denied on procedural grounds, the proper inquiry is whether the Commission's decision on the motion to reconsider the denial of the motion to clarify is a decision *on the merits*. A decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review. *Bowman v. Loperena,* 311 U.S. 262 (1940). The majority, however, never reaches this question.

I thus disagree with the conclusion that the October 20, 1982 decision was not ripe for review. I am also disturbed by the ostensible ease by which the panel finds jurisdiction. Apparently, this court is not "fastidious about the impropriety of reaching merits issues without first establishing jurisdiction." *Beattie v. United States,* No. 84-5413 slip op. at 44 (D.C. Cir. Dec. 31, 1984) (Scalia, J., dissenting, opinion filed Feb. 26, 1985). *Compare Eagle-Picher, supra,* at 12 ("[p]roffered excuses for late filing are carefully scrutinized"). In my view, the very substantial delay of petitioners should not be so rewarded. My only solace lies in the hope that the majority's retrospective ripeness analysis is motivated by the fact that the present proceedings were conducted without the benefit of *Eagle-Picher.*

II.

Even assuming a finding of jurisdiction in this case is correct, the majority has clearly erred in its decision on the merits. It decides that because the ICC did not make an *express* finding that the waiver of any labor protec-

tions applicable to the crew selection provisions in the trackage rights applications was "necessary" to approval of the transaction, it exceeded its authority under the Interstate Commerce Act, 49 U.S.C. § 11341(a) (Supp. IV 1981), in excepting those provisions from any labor protections. Without explanation, though, the majority vacates the ICC's decision on crew selection and relegates that issue to *arbitration* under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

Why the lack of an express "necessity" finding in and of itself requires the court to vacate the ICC's approval regarding crew selection on this record is puzzling. The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger. Presumably, the majority senses a conflict between the approved crew selection provision and the unions' asserted rights. The majority, however, if it knows, does not indicate what the parameters of the unions' claimed rights might be and similarly fails to state where, if anywhere, these rights and applicable labor protections intersect. For all the majority indicates, they may not conflict at all. Indeed, this was the conclusion reached by the ICC (J.A. 163-64). Obviously, if there is no conflict, there is no need to *vacate* the Commission's decision on crew selection. Yet, in the absence of any evidence supporting the unions' claims, and in the face of justifications for the ICC's decision, the majority, without further inquiry, leap frogs the Commission's findings and completely nullifies the *authority* of the ICC to provide for crew selection in trackage rights agreements imposed to ensure that consolidations are in the public interest. The majority's reasons for doing so are inexplicable.

The arguments of the Engineers and the UTU, and the majority decision itself, are based on the fundamental assertion by the unions that they enjoy by custom and by collectively-bargained agreements a right to crew all trains passing over the Misouri Pacific's tracks. This is tantamount to a declaration that the unions, in effect, have a proprietary interest in the tracks of their employer—an astonishing contention. Also implicit in the unions' assertion is the claim that the unionized employees of the consolidated railroads (the Missouri Pacific, UP, and WP) have a colorable right to bargain *with the Katy and the Rio Grande* over who will crew the trains of the latter railroads. There is no basis in law or fact for such an absurd conclusion. It is basic contract law that one cannot be bound by agreements between third parties. Even assuming such rights might exist, the ICC found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process" of foreign railroads operating under trackage rights (J.A. 168). However, the majority today rules that the mere *pleading* of such rights, without more, trumps the authority vested in th ICC to make crew selection decisions regarding trackage rights.

In my opinion the court errs partly because it confuses the issue in this case. It states that "[t]he dispute is not over whether the railroads could use their own crews; [the dispute] . . . is whether they could use their own crews subject to the requirements of the [statutory] labor protection conditions." Maj. Op. at 14. The ICC's October 20, 1982 decision stated that the labor protections *would* apply to the transaction. As previously explained, the ICC saw no apparent conflict between the

protective labor conditions and its decision to permit crew selection by the railroads who operate the trains. But in its 1983 decisions, in an effort to meet the unions' scattered arguments, the Commission ruled in the alternative that the crew *selection* process was exempt from any labor protection conditions that *might* apply. In my view the issue in this case, assuming that the applicable labor provisions in the Act conflict with the proposed ICC action, is merely whether the ICC had the authority to so exempt the crew selection process from applicable labor protection conditions, and if so, whether it properly exercised that authority. In all other respects, the statutory labor protections still apply.[2]

The Interstate Commerce Act in section 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is *exclusive*. . . . A carrier, corporation, or person participating in that transaction is exempt from the antitrust laws *and from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

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2. *See* Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315, 317 n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.").

Because the majority did not reach the issue of whether the labor protections under 49 U.S.C. § 11347 can be exempted through § 11341(a)'s exemption power, I too express no view on that issue. However, it seems to me that in this case where the trackage rights applications were approved specifically to offset the anticompetitive harms of the consolidation, the unions' rights under *N&W* Art. I § 4 exist vis a vis the consolidating railroads and not against either the Katy or the Rio Grande.

49 U.S.C. § 11341(a) (emphasis added). The authority granted the ICC under this statute is very broad. To the extent necessary to approve a transaction—the merger in this case—the ICC may exempt the carrier involved from *"all other law."* This is plain language, and there is nothing on which to base any contention that it does not mean exactly what it says, or that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982)[3] is not a "law" subject to the exemption authority under § 11341(a).

In *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.* (*"North Western"*), 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the court held that § 5(11) of the Interstate Commerce Act (now § 11341(a)) conferred exclusive and plenary jurisdiction upon the ICC to approve mergers and exempt the carrier from all other restraints of *federal law,* including the Railway Labor Act ("RLA"). *Id.* at 429, 431-32. In that pre-Staggers Act case, the court affirmed the order of the ICC that approved a stipulation by the carriers that overrode the RLA. The court rejected the union's claim, which is similar to that made here, that the ICC lacked jurisdiction because it failed to find *expressly* that the provisions of the Railway Labor Act were rendered inoperative. *Id.* at 432. Rather, the court agreed with the Commission's finding, as expressed in another proceeding, that "[t]he terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints." *Id.* (quoting *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease,* 295 I.C.C. 696 (1958)).

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3. 45 U.S.C. § 152, Seventh, for example, forbids generally a carrier's change in pay, rules, or working conditions *contrary to labor agreements,* without resort to negotiation.

In the present case the Commission similarly noted that the provisions of § 11341(a) provide "self-executing immunity on all material terms of the agreement . . . to the extent necessary to . . . implement[] the agreement" (J.A. 171) (emphasis added). Granted, *North Western, supra,* involved a stipulation by the carriers which required arbitration in a manner similar to that provided by the R.L.A. The majority, however, refuses to recognize the clear breadth of the ICC's authority expressed in *North Western.* Rather, it attempts to distinguish the case by noting how *similar* it is to the present case, *see* Maj. Op. at 19 n.6, a novel technique that substantially broadens the ability to reach the result desired by the majority.[4]

The apparent ease by which the majority arrives at its conclusion is attributable in large part to its mischaracterization of Supreme Court precedent. Through the majority's misreading of these cases, it has manufactured

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4. City of Palestine, Texas v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), relied on by the majority, does not support its position. In that case, the ICC was found to have exceeded its authority when it voided an agreement with the city of Palestine to maintain a certain number of employees there, which was "not *germane* to the success of the approved . . . transaction." *Id.* at 414 (emphasis added). In the present case, not only does the record support the fact that the crew selection provision was important to ameliorate the anticompetitive aspects of the proposed consolidation, the Commission itself found the provision "material" to and "related to the transportation effects" of the transaction (J.A. 170, 171). Similarly, Texas & New Orleans R.R. v. Board of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963), is not relevant to this case. That case involved the union's power to strike under the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, and the court in fact stated that "section [5(11), now § 11341(a),] relieves the carriers of the restraints and limitations of other *laws,* but it does not, on its face, relieve them from the actions of other parties, i.e., the union's economic threat of a strike." *Id.* at 156 (emphasis added).

a wholly new and more difficult ICC waiver standard. The majority claims support from "one line of cases" that assertedly permits ICC waiver "only if those state laws pose an *obstacle* to the transaction." Maj. Op. at 17 (emphasis added). No such "line" exists.

The principal case the majority cites for its contention, *Callaway v. Benton,* 336 U.S. 132, 140-41 (1949), set forth the majority's quote in *dicta*. *Callaway* involved a railroad reorganization under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, and under the "narrow facts" there present (336 U.S. at 150), raised the question whether a bankruptcy court could enjoin a state court suit leading to a determination of the requirements of state law with respect to the sale of the entire assets of the lessor railroad. In its limited two paragraph discussion of § 5(11) of the Interstate Commerce Act (now § 11341(a)), the Court expressly rejected any reliance on that section of the Act and, furthermore, distinguished the Bankruptcy Act from the Interstate Commerce Act. *Id.* at 139-40 ("[T]hat section [§ 5(11)] relates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization.") ("That power [under § 77] flows from a different source than the power over consolidations under the Interstate Commerce Act."). In its only comment relevant to this case, the Court merely reiterated that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override* state laws interposing obstacles in the path of otherwise lawful plans of reorganization." *Id.* at 140-41 (emphasis added) (footnote omitted).

The remaining cases cited by the majority similarly fail to support the proposition for which they are cited. In *Seaboard Air Line R. Co. v. Daniel,* 333 U.S. 118

(1948), a South Carolina statute forbade the operation of foreign railroads in that state. The ICC approved a transaction and exempted the railroad from the strictures of the state law. The South Carolina Supreme Court held that the ICC lacked power under § 5 to relieve the carrier from the state law requirements. The Court reversed, explaining:

> . . . Furthermore, since that case [*Texas v. United States*, 292 U.S. 522 (1934)] was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may *interfere with* efficient and economical railroad operation. By § 5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49 U.S.C. § 5(11), Congress granted the Commission "exclusive and plenary" authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. *The breadth of this grant of power can be understood only by reference to § 5(2)(b) which authorizes the Commission to condition its approval upon "such terms and conditions and such modifications as it shall find to be just and reasonable."* All of this power can be exercised in accordance with what the Commission may find to be "consistent with the *public interest.*" The purchaser of railroad property with Commission approval is authorized by § 5(11) "to own and operate any properties . . . acquired through said transaction without invoking any approval under State authority," and such an approved owner, according to that paragraph, is "relieved from the operation of *the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them*

> *to carry into effect the transaction so approved* . . . and to hold, maintain, and *operate* any properties . . . acquired through such transaction."
>
> This language very clearly reposes power in the Commission to exempt railroads under a § 5 proceeding from state laws which bar them from operating in the state *or impose conditions upon such operations.*

Id. at 125-26 (emphasis added). Thus, the Court did *not* adopt an "obstacle" standard; rather it articulated the standard as being the *"public interest"* goal of the statute.

The third case cited by the majority, *Texas v. United States*, 292 U.S. 522 (1934), concerned the ICC's approval of a transaction that had exempted a railroad from the prescriptions of a Texas statute which required a railroad operating in the state to maintain offices there. The Commission had found that requiring the railroad in question to maintain such offices would entail "unnecessary" and "burdensome" expenditures and waived compliance therewith. *Id.* at 533. In upholding the ICC the Supreme Court noted:

> Title II of the Emergency Railroad Transportation Act, 1933, in amending § 5 of the Interstate Commerce Act, carries its own provision as to immunity from state requirements which would stand in the way of the execution of the policy of the Congress through the Commission's orders.
>
> • • • •
>
> . . . The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of *economy* and *efficiency* in interstate transportation by the removal of the bur-

> dens of excessive expenditure, the removal of such *burdens* when imposed by state requirements was an essential part of the plan. . . .

Id. at 534. The granting of full trackage rights here is also an essential part of the plan to permit the merger and to compensate—in the public interest—for some of its anticompetitive effects.

Finally, in what can charitably be attributed to oversight, the majority fails to mention in its line of precedent and relegates to a footnote *Schwabacher v. United States*, 334 U.S. 182 (1948), which contradicts the majority's position by stating that the *"public interest"* is the controlling consideration.[5] In *Schwabacher*, the ICC approved, again under § 5(11), the voluntary merger of three railroads. Intervening dissenting shareholders of one of the merging railroads alleged that the terms of the merger would deprive them of charter rights granted by their company's state of incorporation. The Commission, however, disclaimed jurisdiction to pass on the claims of the shareholders and stated that the railroads were free to settle such controversies "through negotiation and litigation in the courts." *Id.* at 188. The Supreme Court reversed. It held that the Commission erred in renouncing its authority to determine finally the rights of the dissenting shareholders, and specifically held that

> . . . *no rights* alleged to have been granted to dissenting stockholders by state law provision concerning liquidation *survive* the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

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5. *Compare* Callaway v. Benton, 336 U.S. 132, 141 n.10 (1949) ("Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118; *Schwabacher v. United States, 334 U.S. 182;* Texas v. United States, 292 U.S. 522.") (emphasis added), *with* Maj. Op. at 17.

Id. at 201 (emphasis added). The Court reasoned that it would be "inconsistent to allow state law to apply a liquidation basis . . . for continued public service." *Id.* at 200. Regarding the waiver authority, the Court reaffirmed that " 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' " *Id.* at 193-94 (quoting *Seaboard Air Line R. Co. v. Daniel,* 333 U.S. 118, 124-25 (1948)). The Court noted that "[t]he tenor of all . . . [its prior decisions under the Transportation Act of 1920, 41 Stat. 456] was to confirm the power and duty of the Interstate Commerce Commission, *regardless of state law,* to control rate and capital structures, physical make-up and relations between carriers, in the light of the *public interest* in an efficient national transportation system." *Id.* at 192 (emphasis added). Similarly, "[t]he Transportation Act of 1940 [54 Stat. 908, 49 U.S.C. § 5(11)] . . . authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of *public interest, justice and reasonableness,* in which case they should become effective *regardless of state authority.* *Id.* at 193 (emphasis added) (footnote omitted).[6]

In sum, not only did the Supreme Court *not* adopt the rigorous "obstacle" standard which the majority today

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6. The majority's citation to County of Marin v. United States, 356 U.S. 412 (1958) in this discussion is misleading. That case held only that the transaction involved was not within § 5(2)(a) because one party in the acquisition was not a "carrier." The case had nothing to do with the scope of the Commission to approve transactions that *are* within the Commission's jurisdiction or with its waiver authority.

requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions "consistent with *the public interest*" and to ensure that they are "just and reasonable." *Schwabacher,* 334 U.S. at 194-95.

The majority would admonish us that the ICC's exemption authority under section 11341(a) must operate "according to necessity, not according to whim or caprice" and that in exercising this authority, "ICC must do more than shake a wand to make a law go away." Maj. Op. at 16-17. However, in this case it is not the ICC but the majority of the panel which relies on occult powers. For it is the majority who has made the ICC's section 11341(a) exemption authority completely disappear and who has used its opinion to obscure the basis for the ICC's decision to exempt the crew selection process from any protective labor conditions.

There is no dispute here that the approval of the Katy and Rio Grande trackage rights was "necessary" to the approval of the UP-Missouri Pacific-Western Pacific consolidation. The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-79. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC,* 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied,* 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this "necessity" finding, the trackage rights as applied for by the Katy and the Rio Grande.

The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is

far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *id.*, and to offset to some extent the monopolistic effects of that enormous consolidation.[7] The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

Moreover, the majority's self-styled definition of "trackage rights," upon which the opinion depends, reduces that term to nothing more than a railroad's right only to have its traffic run over another's tracks. *See* Maj.

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7. For example, the ICC found that the UP-Missouri Pacific-WP consolidation itself, within the areas where the merged lines overlap, will reduce Missouri Pacific traffic on the Pueblo-Kansas City line by 18.7% in the years following the consummation of the merger. Granting the Rio Grande trackage rights will, as the ICC found, contribute substantially to the economic viability of the Pueblo-Kansas City line. 366 I.C.C. at 572. Moreover, the ICC found that granting the Rio Grande "independent access" to Kansas City through trackage rights would enable it to provide new competitive routes to compensate for the loss of traffic at the Utah gateway which the Rio Grande previously derived from its relations with the WP. *Id.* at 576. Thus, the ICC found a substantial public benefit realized by enhancing and stimulating competition in the central corridor. *Id.* Both the merged lines and the Rio Grande would benefit.

Op. at 7 n.2. The majority *assumes*, with no justification whatsoever, that this cannot include a railroad's right to use its own crews in operating its own trains. This bespeaks an ignorance of what trackage rights might involve and ignores the crew selection provisions that are an integral part of the applications in this case. The majority, in fact, has pulled its definition out of its magic hat. Indeed, even UTU counsel at oral argument conceded that whether a railroad's "trackage rights" include a railroad's right to use its own crews "is really a very generic term subject to subsequent specific negotiations." The sole evidence of the meaning of the trackage rights that are here involved is found in the trackage rights applications and the decisions granting them.[8] Those applications stated in express terms that the Katy and Rio Grande would exercise their trackage rights by operating their own trains with their own employees and crews. But rather than at a minimum remanding the record to the ICC for further clarification on this point, the majority *decides* in the teeth of the specific crew provisions themselves that trackage rights in this case do not include a railroad's right to use its own crews, even though such method of operating its trains was specifically applied for and authorized by the ICC. Such action is unseemly, without precedent, and completely unjustifiable.

That the ICC specifically left open for later negotiation between the railroads such terms as trackage compensation is no reason to infer that crew selection, which was specifically covered in the trackage rights applications,

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8. Other cases have attempted to define "trackage rights." *See, e.g.*, Chicago, Rock Island & Pacific R.R. v. Chicago, Burlington & Quincy R.R., 437 F.2d 6, 10 (7th Cir.) ("Trackage rights" are continuing or permanent easements or licenses granted by one railroad to another railroad), *cert. denied*, 402 U.S. 996 (1971).

was not decided. Approval of crew selection had been expressly requested in the railroad's application for trackage rights, and both applications had been approved. The ICC similarly considered it a "material term" of the trackage rights transactio (J.A. 171), a finding that the majority attempts to disregard. Whether a railroad uses its own crews to operate *its own trains* was not the type of "subsidiary" trackage issue the ICC left open for later negotiation. *See* Maj. Op. at 20-21. To require that Katy and the Rio Grande to submit the issue of crew selection to arbitration could frustrate the trackage rights agreement itself and could destroy one of the essential conditions upon which the ICC approved the merger.

Finally, petitioners cannot now complain that the Commission failed to make a specific finding about the necessity for the crew selection process when no party, *including the petitioners,* contended during the hearings that granting the pending applications of the Katy and Rio Grande would improperly override existing collective bargaining agreements (J.A. 164, 167). At a minimum, as has been the practice of this court, one would expect the majority under such factual situation to remand the record to the Commission to articulate the majority's required necessity finding.

The majority has thus found itself with the rather absurd result that the Katy and the Rio Grande may not, in the exercise of their trackage rights, use their *own* employees to operate their *own* trains carrying their *own* traffic, for their *own* account, until the railroads have engaged in collective bargaining under the Railway Labor Act with their employees and possibly those of competitor railroads. As one trial judge has already noted in a related proceeding involving many of the same issues as we

have here, "Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific R.R. v. United Transportation Union,* 580 F. Supp. 1490, 1505 (E.D. Mo. 1984), *appeal pending* (8th Cir.).

In my view, the majority has vacated the ICC's crew provision based on assumptions not supported by the record. It has closed its eyes to the specific pro-competitive purpose that the ICC found would be served by the approval of the trackage rights applications in this case. In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC. I cannot join in such a curtailment of the authority that Congress has granted to the ICC under 49 U.S.C. § 11341(a), and which the ICC exercised to ensure that the consolidation it approved would serve the *"public interest."* 366 I.C.C. at 572, 644. Since this is one of the largest mergers in the history of American railroads, the majority's failure to correctly apply the law here could lead to tremendous nationwide harm. Accordingly, I dissent.

APPENDIX B

Judgment of the Court of Appeals

(Filed May 3, 1985)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

Before: WRIGHT and MIKVA, Circuit Judges, and
MACKINNON, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Interstate Commerce Commission under review herein are vacated and the cases are remanded for further proceedings consistent with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 3, 1985

Opinion for the Court filed by Circuit Judge Wright.

Dissenting opinion filed by Senior Circuit Judge MacKinnon.

APPENDIX C

Order of the Court of Appeals Sua Sponte Amending the May 3, 1985 Opinion

(Filed July 12, 1985)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
INTERVENORS

Before WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed by Circuit Judge Wright on May 3, 1985, and hereby is, amended as follows:

The fourth full paragraph on page 3 is amended to read:

> Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions and remand the case to the Commission for proceedings consistent with this opinion.

The only paragraph of text on page 22 is replaced with the following paragraph:

> We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Footnote 10 on page 22 is deleted.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

Order of the Court of Appeals Sua Sponte Amending the May 3, 1985 Dissenting Opinion

(Filed July 19, 1985)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

And Consolidated Case No. 83-2317

Before: WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Dissenting Opinion filed by Senior Circuit Judge MacKinnon on May 3, 1985 be, and hereby is, amended as follows:

Page 6, line 10, after "17." insert: "[P]etitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so

at the risk of finding their claims time-barred." *Id.* at 6.

Page 7, line 7 from the bottom, beginning with the word "Without", strike it and the remainder of said sentence on lines 6, 5 and 4 from the bottom.

Page 9, line 5 of text, after the period following "168)", strike the remainder of said line and all of lines 6, 7 and 8.

Page 19, line 7 of text, strike all of said line and all of line 8 down to and including "point,".

Page 19, line 13 of text, strike everything after the period and all of line 14.

Page 19, line 27 of text, after the word "that" and before the word "Katy," insert: "the" and in line 28 strike the word "to".

Page 20, line 5 of text, strike all of said line after the period following "167)" and strike all of lines 6, 7, 8 and 9.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

Orders of the Court of Appeals Denying Petitions for Rehearing and Suggestions for Rehearing En Banc

(Filed August 9, 1985)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

And Consolidated Case No. 83-2317

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the various parties have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions for rehearing *en banc* are denied.

Per Curiam
FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Starr would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

And Consolidated Case No. 83-2317

[Filed Aug. 9, 1985]

Before: WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ORDER

Upon consideration of the petitions for rehearing of the various parties, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER

Senior Circuit Judge MacKinnon would grant the petitions for rehearing.

APPENDIX F

Decision of the Interstate Commerce Commission Denying Petition for Clarification

(Filed May 12, 1983)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
—TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD
COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—
TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD
COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: May 12, 1983
[Served: May 18, 1983]

By petition filed April 4, 1983, the Brotherhood of Locomotive Engineers (BLE) seeks clarification of our decision[1] approving the consolidation of the Union Pa-

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1. *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982), embracing Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Pueblo, CO and Kansas City, MO*, and Finance Docket No. 30,000 (Sub-No. 25), *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Kansas City, KS and Omaha, NE*.

cific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) (collectively referred to herein as applicants). The Missouri-Kansas-Texas Railroad Company (MKT), the Denver and Rio Grande Western Railroad Company (DRGW), and applicants have filed replies.

BACKGROUND

Pursuant to 49 U.S.C. 11343-4, applicants sought authority to consolidate their railroad systems under the common control of Union Pacific Corporation and Pacific Rail System, Inc., a new railroad holding company.[2] The consolidation decision, served October 20, 1982, which BLE seeks to have clarified, approved the proposed transaction[3] subject to various conditions. These conditions included approval of DRGW and MKT responsive trackage rights applications in the embraced Sub-No. 18 and Sub-No. 25 proceedings, respectively. The approved trackage rights authorize DRGW to operate over MP's line between Pueblo, CO, and Kansas City, MO, and authorize MKT to operate over MP's line between Kansas City, KS and Omaha, NE. Approval of the consolidation was conditioned upon the grant of these trackage rights in order to protect the public interest from potential anticompetitive harms.

POSITIONS OF THE PARTIES

BLE: BLE seeks to have the consolidation decision clarified with respect to whether MKT and DRGW may use their own operating crews in performing trackage

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2. In another application, handled on a consolidated basis, UP sought authority to acquire control of Western Pacific Railroad Company.

3. The consolidation was subsequently consummated on December 22, 1982.

rights operations over MP lines. It asserts that this Commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT or DRGW to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

MKT: MKT asserts that the consolidation decision clearly and correctly authorizes it to conduct trackage rights operations using its own crews. MKT's operating plan submitted as part of its trackage rights application specified that the operations would be conducted using MKT crews. The application was approved without restrictions on the proposed operating plan. MKT notes that we have very broad conditioning powers under 49 U.S.C. 11343 in consolidation proceedings and that our jurisdiction over consolidations, and the terms and conditions thereof, is plenary under 49 U.S.C. 11341.

DRGW: DRGW contends that our later decisions in these proceedings, served November 24, 1982, and January 18, 1983, regarding DRGW trackage rights operations clearly and unambiguously state that DRGW has been authorized to conduct operations over MP lines using its own crews. Therefore, DRGW considers this issue to be moot with respect to its operations.

Applicants: Applicants argue that the consolidation clearly authorized MKT and DRGW to operate using their own crews. The trackage rights applications specified that the trackage rights tenants would use their own crews and no party opposed that aspect of the plans during the course of these proceedings. Approval of the

applications, including the operating plans, they state, is within our jurisdiction.

DISCUSSION AND CONCLUSIONS

The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.[4]

BLE has presented no argument or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided. Its petition does not present any facts, however, that warrant reopening these proceedings for reconsideration. We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews. The petition will be denied.

This action will not significantly affect the quality of the human environment or energy conservation.

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4. This includes current employees of MKT and DRGW as well as any new employees they may hire of their own free will (including MP employees).

It is ordered:

1. The petition of BLE for clarification is denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL) AGATHA L. MERGENOVICH
Secretary

APPENDIX G

Decision of the Interstate Commerce Commission Denying Petition for Reconsideration

(Filed October 19, 1983)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY —TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY— TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR RECONSIDERATION

Decided: October 19, 1983
[Served: October 25, 1983]

By petition filed May 31, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. 1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we may fully address the issues.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. *Union Pacific-Control-Missouri Pacific; Western Pacific,* 366 I.C.C. 459 (1982). Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. 11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.[1] DRGW's proposed

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1. *Norfolk and Western Ry. Co.—Trackage Rights-BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate,* 360 I.C.C. 653, 664 (1980) (*NW-BN* conditions).

agreement specified that DRGW could, at its option, perform trackage rights operations using its own crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroads and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that this Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize DRGW and MKT to operate over MP lines using their own crews. BLE and UTU now seek reconsideration of our decision denying that request for relief.

In its petition for reconsideration, BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA) 45 U.S.C. 151, *et seq.* BLE further asserts that trackage rights operations by DRGW and MKT using their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.[2]

UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bar-

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2. The consolidation is subject to the usual labor protective conditions as set forth in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock* conditions).

gaining agreements. UTU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

In their replies, DRGW, MKT, and UP-MP assert that the arguments of BLE and UTU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights applications.

UTU, in its response to the railroads' pleadings, makes further arguments regarding purported violations of the RLA, collective bargaining agreements, and the *New York Dock* conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenants' crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the *NW-BN* and *New York Dock* conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage

rights operations which we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the *New York Dock* and *NW-BN* conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11341, to exempt a transaction from the requirements of the RLA.

The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963).

Contrary to UTU's arguments, the 4-R Act[3] did not limit our authority to exempt a transaction from the

3. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng., supra,* at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transac-

tions from the RLA, we failed to do so in this proceeding. Further, they argue that we have not attempted to reconcile the decision with the policies of the RLA nor made any findings supporting an exemption from the RLA.

The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. *See Brotherhood of Loc. Eng. supra, citing Chicago, St. P., M. & O. Ry. Lease,* 295 I.C.C. 696, at 432 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. 11344, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that those policies are relevant to the determination of whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. *See McLean Trucking Co. v. United States,* 321 U.S. 67, 87 (1944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in

any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over UP-MP lines would constitute a unilateral change in working conditions for UP-MP employees in violation of the *NW-BN* and *New York Dock* conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditions which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January 1981, and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in MKT's application specified: – "MKT, with its own employees, and its

sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed agreement Section 5, MKT trackage rights application, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25). DRGW's application provided: "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track . . . ." Proposed agreement Section 6(c)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8). Therefore, in January 1981, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, 1981, DRGW and MKT filed their verified statements in support of their responsive applications. These statements further make clear the position of those carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over WP[4] and MP, we anticipate that a fewer number of employees will be displaced, or a reduction of 176 jobs as opposed to 350 jobs if these applications are not granted." Verified Statement of A. H. Nance, at 15. MKT's evidence stated: "The projected position impacts shown on Exhibit 4 [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other affects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential pro-

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4. The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

visions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold M. Hacker, at 2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Hacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Hacker. *See* Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 23, 1981, at 3398-3417. Thus, Mr. Hacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

Mr. Nance was cross-examined by various parties, including UTU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 23, 1981, at 8432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want," at 8433, *also see* at 8449-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within the discretion of the managements of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. BLE did not question him. Counsel for UTU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the primary transactions on DRGW's employees. No questions were asked regarding DRGW's assessment of the labor impacts of its sought responsive trackage rights. Transcript at 8555-8.

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 3, 1981, BLE submitted the verified statement of Edmund G. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-1, entered into evidence as BLE-H(VS)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] . . . it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect . . . ." BLE-H (VS) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to participate in trackage rights work force selection. Rather, he testified that UP engineers

would be adversely affected by approval of the responsive applications. Transcript, at 12,974-81, September 16, 1981.

On August 31, 1981, the parties identified as Various Labor Organizations, including UTU, submitted verified statements (VLO-H(VS)-2). Representatives of UTU provided verified statements included in VLO-H(VS)-2. None of those statements, however, contain testimony supporting the assertion that UP-MP employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither UTU nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Nance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of UTU accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the responsive trackage rights. Rather, it merely made reference to BLE-H (VS)-2 on that point. Thus, the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and UTU have cited decisions such as *St. Louis Southwestern Ry. Co.* v. *Broth. of Railroad Signalmen,* 665 F.2d 987

(10th Cir. 1981) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetitive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, *Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & I.M. Ry. Co.* (not printed), served February 22, 1977 and Finance Docket No. 30138, *Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co.* (not printed), served May 17, 1983.

In *Illinois Central Gulf,* the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the

section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdiction over all *other* subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in *Illinois Central Gulf*. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In *Cairo Terminal*, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petitions of BLE and UTU for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX H

Statutes Involved

Section 11341, Title 49, United States Code provides that:

Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

Section 11343, Title 49, United States Code provides that:

Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which

may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e) (1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, con-

solidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such

carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

Section 11344, Title 49, United States Code provides that:

Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) (1) In a proceeding under this section which involves the merger or control of at least two class I

railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not pro-

tested by interested parties within 30 days following receipt of such application.

Section 11347, Title 49, United States Code provides that:

> Employee protective arrangements in transactions involving rail carriers
>
> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 156, Title 45, United States Code provides that:

> Procedure in changing rates of pay, rules and working conditions

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Section 152, Seventh, Title 45, United States Code provides that:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 565(a) and (b), Title 45, United States Code provides that:

Protective arrangements for employees—Duty of railroads; discontinuance of intercity rail passenger service

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 545 and 562 of this title pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

Substantive requirements for protection

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) (f) of Title 49. Any contract entered

into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a) (1) of this title between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

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Nos. 85-983 and 85-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY,
Cross-Respondents.

Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CROSS-RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITIONS

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---

BRIEF OF CROSS-RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITIONS

The instant cross-petitions are related to petitions for writ of certiorari to the United States Court of

Appeals for the District of Columbia Circuit that were filed on November 7, 1985, by the Interstate Commerce Commission (ICC) and the Missouri-Kansas-Texas Railroad Company (MKT), Nos. 85-792 and 85-793 respectively. Thus, the regulatory agency involved (the ICC) one of the trackage rights tenants whose operations are in issue (MKT), and the two rail brotherhood parties, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) are in accord that the court of appeals decision warrants the exercise of this Court's supervisory powers. Indeed, the same is true of railroad employers generally and of railroad labor unions generally. (*See*, Brief of the Association of American Railroads and National Railway Labor Conference (AAR/NRLC) *as amici curiae* and UTU Cross-Petition at 16, representing the position of the Railway Labor Executives' Association).

This brief is submitted in opposition to the union cross-petitions, however, because they seek to have the Court review questions which the court of appeals never considered or decided. The practical effect of granting the petitions would be the direct review of the conclusions of the ICC, an improvident exercise of this Court's supervisory authority. Furthermore, even if one were to read this Court's Rule 17, substituting "ICC" for "federal court of appeals", the criteria for granting a writ would still not be satisfied because the cross-petitioners' substantive arguments are flawed. Nothing in the ICC decisions reviewed by the Court of appeals conflicts with applicable decisions of this Court and there is no conflict in the circuits concerning the question presented.

STATEMENT OF THE CASE

Cross-respondent MKT accepts, for the most part, the statement contained in the UTU's cross-petition at pages 3-11. For convenience of reference, we shall also follow the style of the UTU cross-petition in citing to the ICC decisions and the court of appeals decision below by reference to the Appendix to the ICC's petition for certiorari in No. 85-792 (cited as "ICC App.").

Almost all of the UTU's statement treats with matters which the court of appeals decided. To that extent, it is consistent with MKT's own earlier petition and MKT concurs that the resolution of those issues calls for the exercise of this Court's power of supervision.

The UTU statement is inadequate, however, in addressing the question that it seeks to have this Court resolve: the contention that 49 U.S.C. § 11347 constitutes an absolute bar to ICC authorization of parties to an approved trackage rights transaction to specify the crews to be used, irrespective of the facts of the case or whatever findings the ICC may make concerning the necessity for a manning provision to effectuate the purposes of the underlying transaction found to be required by the public interest.

That issue was never decided by the court of appeals. Indeed, as we shall demonstrate, it is not even the one that the court of appeals declined to decide. The principal error in the UTU's statement, however, is its assertion that the court of appeals "did not address the issue because it *initially* vacated the ICC's decisions 'in their entirety' *without a re-*

mand." (Cross-Petition at 11, emphasis added). That contention is simply fallacious. To be sure, the court of appeals did "initially" vacate the ICC's orders "without a remand." And, to be sure, the court of appeals declined to decide *some* issue. But the suggestion that the court of appeals neglected to correct or reconsider the declined issue when it *sua sponte* amended its decision to provide for a remand is belied by the care the court exercised in carefully amending the opinion to reflect its changed position. (Compare ICC App. at 3a, 21a, 28a, 30a, 40a-41a with ICC App. at 45a-47a.).

SUMMARY OF ARGUMENT

The UTU makes two arguments. First, it contends that the ICC's consistent policy prior to the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895) was to reject contentions that the section 11341(a) exemption power extended to Railway Labor Act (RLA) rights, but that, since the Staggers Act, the ICC had reversed its field. (UTU Cross-Petition at 11-16). That is manifestly incorrect. The ICC's interpretation of 49 U.S.C. § 11341(a), and its predecessor, section 5(11) of the Interstate Commerce Act, has been consistently followed for decades.

The UTU's second argument is that "the ICC [not the court of appeals] has decided an important question in a manner which conflicts with applicable decisions of this Court." (UTU Cross-Petition at 17). The applicable decisions are alleged to be *Watt v. Alaska,* 451 U.S. 259 (1981) and *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962). *Watt* and *Burlington,* however, given the most favorable reading from the UTU's point of view, stand at most

for the proposition that potentially conflicting statutes are to be read so as to harmonize their legislative purposes. That is precisely what the Commission has done here. It is the interpretation contended for by the UTU—that the Railway Labor Act is paramount under all circumstances—which does violence to the *Watt* and *Burlington* principles.

The BLE joins the UTU's first argument (BLE Cross-Petition at 10-16). In addition, however, it contends that the decision below conflicts with the decisions of this Court in *Detroit & T. S. L. R.R. Co. v. Brotherhood of Locomotive Firemen and Enginemen,* 396 U.S. 142 (1969) and *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.,* 362 U.S. 330 (1960). (BLE Petition at 16-19). No such conflict exists. The *Shore Line* case, as cited by BLE, is a simple exegesis of the operations and the purpose of the Railway Labor Act's negotiation and mediation provisions. The *Telegraphers* case did not involve 49 U.S.C. § 11341(a)—or, indeed, *any* exercise of Interstate Commerce Commission powers under the Interstate Commerce Act.

Finally,[1] BLE suggests a division in the circuits, contrasting the decision below with *St. Louis S.W. Ry. Co. v. Brotherhood of R.R. Signalmen,* 665 F.2d 987 (10th Cir. 1981), *cert. denied,* 456 U.S. 945 (1982) and *Texas & N. O. R.R. Co. v. Brotherhood of R.R. Trainmen,* 307 F.2d 151 (5th Cir. 1962). The *St. Louis Southwestern* case is inapposite; it dealt with a carrier attempt to alter an agreement reached with the unions

[1]Our reference is to BLE's final point in support of its petition (Point 1-C of its argument). Its physically final argument (Point II of its petition) calls for issuance of the writs prayed for by the ICC and MKT.

after the consummation of the transaction. The *Texas & New Orleans* decision, while favorable to the union in ultimate result, acknowledged that, where the RLA conflicted with public interest findings under the Interstate Commerce Act, the RLA must give way.

ARGUMENT

I. There Has Been No Abrupt And Unexplained Change In The ICC's Interpretation Or Application Of 49 U.S.C. §§ 11341(a) And 11347

BLE and UTU, although from somewhat different perspectives, contend that the ICC effected a sudden reversal of field in the administrative proceedings of which review is sought here. They contend that ICC decisions prior to the enactment of the Staggers Act unequivocally established the paramountcy of the RLA (and agreements entered thereunder) over the ICC's exercise of its plenary and exclusive jurisdiction under section 11341(a), including its exemption authority, citing *Southern Ry.-Control-Central of Ga. Ry.*, 331 I.C.C. 151 (1967);[2] *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958);[3] *Leavens v. Burlington N.*, 348 I.C.C. 962 (1977)[4] and *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Transp. Co.*, 366 I.C.C. 859 (1983).[5]

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[2]UTU Cross-Petition at 13-14 and BLE Cross-Petition at 13-14.

[3]UTU Cross-Petition at 14.

[4]BLE Cross-Petition at 15.

[5]BLE Cross-Petition at 15-16. This case was decided *after*, not before, the *UP-MP Merger Case*.

The BLE prefaces its discussion of this issue by invoking *Chevron*[6] (BLE Cross-Petition at 10-11). We entirely concur with that preface. *Chevron* summarized the proper standard of review of an agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the Statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 2781-2782 (footnote omitted).

The Commission's interpretation of 49 U.S.C. § 11341(a), has been followed consistently for decades. *See, e.g. Texas Turnpike Auth.-Abandonment-St. L. S.W. Ry. Co. of Tex.*, 328 I.C.C. 42, 46 (1965); *Ex*

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[6]*Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984).

Parte No. 260, Revised Regulations Governing Officers, 336 I.C.C. 679, 682 (1970); *Railway Express Agency, Inc., Notes,* 348 I.C.C. 157, 215 (1975). That interpretation is fully supported by the previous interpretations of the statute rendered by this Court[7] and with the statute's legislative history.[8] An interpretation which could require MKT to bargain with MP's employees and face potential disruptions of service in its efforts to perform rail service required by the public interest is simply inconceivable.

The ICC decisions cited by the rail brotherhood cross-petitioners are entirely consistent with this view. The *Chicago, St. Paul* case dealt with a lease by the Chicago and North Western Railway Company (CNW) of certain lines and incidental property owned, used or operated by the Chicago, St. Paul, Minneapolis and Omaha Railway Company (Omaha).[9] The then-extant labor protective conditions were imposed upon the original order of approval. 295 I.C.C. at 696.[10] Following consummation,[11] the CNW sought the imposition of a *new* condition that would preempt

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[7]*See Schwabacher* v. *United States,* 344 U.S. 182, 194 (1948).

[8]The legislative history is exhaustively detailed in *Brotherhood of Locomotive Eng'rs* v. *Chicago and N.W. Ry. Co.,* 314 F.2d 424, 430-32 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963).

[9]The underlying transaction had been approved in *Chicago, St. P. M. & O. Ry. Co. Lease,* 295 I.C.C. 441 (1956).

[10]Those conditions were known as the *Oklahoma* conditions (1944) *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177 and did *not* provide for the compulsary arbitration of implementing agreements, but only for arbitration of claims for cash compensation for aggrieved employees.

[11]Consummation occurred on January 1, 1957; the CNW petition was filed on July 5, 1957. 295 I.C.C., 696-97.

subsequent negotiations conducted under the RLA. Naturally, the Commission refused. But section 5(11)—the predecessor of section 11341(a)—was *not* involved. If it had been, the request for a *new* condition would have been entirely unnecessary. As the ICC noted, the only reason that CNW was obliged to confer with the labor organizations in the first instance was "[i]n the absence of the prescription by us of specific procedures . . ." 295 I.C.C. at 697. The ICC clearly viewed itself as having the power to override section 6 of the RLA; it simply chose not to do so under the circumstances of the case.[12]

Indeed, the CNW petition expressly conceded that the ICC's original order of approval did not confer a section 5(11) exemption, but sought to have ICC exercise its authority to grant such an exemption after the fact. 295 I.C.C. at 699-70. The Commission, in the exercise of its discretion, declined to do so, but it never suggested that it *could* not do so.[13] Moreover,

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[12]Moreover, the ICC noted that many of the operational changes proposed by the CNW "are far removed from the [lines of the] Omaha and would not seem necessarily related to accomplishment of the unification between Northwestern and Omaha." 295 I.C.C. at 697.

[13]The ICC did suggest, in commenting on *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953), that *Kent* related only to obligations imposed on the *carrier*, and not the unions representing employees of the carrier. As the Second Circuit subsequently made clear in expanding on *Kent*, that was a distinction without a difference. The CAB (and the ICC) can also bind the labor organizations involved. *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972).

in reaching its decision, it articulated *exactly* the same interpretation of the exemption section as it did below:

> We find nothing in that paragraph [section 5(11), the predecessor of section 11341(a)], or in the other portions of section 5, which authorizes us to determine and declare the *particular* laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are *self-executing,* and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

295 I.C.C. at 702 (Emphasis added).

Finally, the Commission made the obvious point that since the transaction had already been consummated, "[i]t is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order." *Id.*

The *Southern-Central* case must be read in light of the immediately prior discussion because the ICC relied on the conclusions we have just summarized. That case arose on remand from this Court as a consequence of *Railway Labor Ass'n v. United States,* 379 U.S. 199 (1964), in which the Court concluded that ICC could not cast aside provisions of the Washington Job Protection Agreement (WJPA) with no explanation. Recognizing the primacy of section 5(11), the Association position on remand was that the RLA and existing agreements remain in force "in the absence of lawful reasons requiring *modification* or outright

nullification." 331 I.C.C. at 152-53 (emphasis added). The *Oklahoma* conditions were no longer imposed[14] and section 5 of the WJPA provided that if an implementation agreement could not be negotiated, *compulsory* arbitration was available. 331 I.C.C. at 156. Thus, the RLA section 6 procedures were already overridden. Section 5 of the WJPA preempted the normal consequences of section 6 of the RLA, 331 I.C.C. at 165. That is no less true when the substance of section 5 is imposed as a labor protective condition. The language quoted by BLE and UTU in their cross-petitions was addressed to the claim of the Southern Railway that it was exempt from all laws and contracts, even those whose application would *not* frustrate the approved transaction. 331 I.C.C. at 166-171. Indeed, in the complained of actions, the Southern ignored both the imposed conditions and the WJPA, 331 I.C.C. at 171-173.

The BLE's invocation of *Leavens* is totally inapposite. The Commission, in the passage BLE quotes, was neither shrinking from its authority to define and impose labor protective conditions nor renouncing its exclusive and plenary power to approve transactions and exempt them from all laws, including the labor laws. The ICC did disclaim any desire to set itself up as a labor court to adjudicate every grievance arising from a claimed violation of a labor protective provision or of a collective bargaining agreement. 348 I.C.C. at 975-977.

Finally, in *BLE* (which was decided three months *after* the granting of the MKT's trackage rights application), the BLE's complaint against CNW opera-

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[14]*See* discussion at 331 I.C.C. 159-166.

tions over the lines of the Indiana Harbor Belt Railroad Company (IHB) was dismissed. There CNW operated over IHB lines, displacing IHB locomotive engineers, pursuant to an ICC-approved trackage rights agreement. BLE, interestingly enough, did not suggest any impropriety in that operation *if* the trackage rights agreement had been lawfully consummated. Its contention was that CNW's authority had lapsed through non-exercise and that there was therefore no approved transaction to which an exemption could attach. We suggest that BLE's posture in that case constitutes an acknowledgement that MKT's operations here are beyond challenge. The language quoted by BLE involved a second aspect to its complaint—a request that ICC serve as the forum for litigating BLE's protective condition claim against IHB. (The analogy to the instant case would be a request that ICC try out a BLE claim against MP for compensation for MP engineers allegedly displaced by the MKT trackage rights operation.). As in *Leavens,* ICC remitted the union to its arbitral remedies, refusing to become a labor court.

II. The Issue Of Which Review Is Sought, If Decided At All By The Court Of Appeals, Was Not Decided Inconsistently With Prior Decisions Of This Court

The UTU asserts as error the ICC's disregard of the teachings of *Watt* and *Burlington* by its alleged failure to construe the Interstate Commerce Act (specifically sections 11341(a) and 11343) and the Railway Labor Act (specifically section 6) so as to accommodate the policies of the two acts. (UTU Cross-Petition at 19-20). This question is not even the one the court of appeals declined to reach (or the one, in BLE's view, which it tacitly decided). The issue which the

rail brotherhoods argued to the court of appeals—and which the court below avoided—was whether there was a conflict between two separate provisions of the Interstate Commerce Act, *to wit*, sections 11341(a) and section 11347. (*See* ICC App. at 20a-21a).

Furthermore, the position advanced by UTU does not contemplate an accommodation of the purposes of section 11341(a) and 11343 with those of either section 11347 or section 6 of the RLA. The UTU's claim for relief requires a conclusion that these labor provisions are completely paramount and override and preempt any conditions imposed in the public interest under section 11343, as well as the ICC's plenary exemption power under section 11341(a).

The principles of decision in *Watt*—that facially conflicting statutes should be read so as to effectuate the legislative purposes of each insofar as possible and that repealers by implication are to be shunned—are longstanding rules of statutory construction imbedded in this Court's jurisprudence long before 1981. Nothing in the ICC decision aggrieving the cross-petitioners is inconsistent with these axioms of interpretation. On the contrary, the ICC complied with them in two separate portions of its decision on reconsideration.

In the first place, ICC "conclude[d] that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements . . ." (ICC App. at 59a). Thus, there was no conflict with the RLA to be reconciled. The ICC acknowledged that it was obliged

to "consider the policies of statutes other than the Interstate Commerce Act to the extent those policies are relevant to the determination of whether a proposal is consistent with the public interest." (ICC App. at 60-61a). But it found no clash between the policies of the RLA and the Interstate Commerce Act:

> The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

(ICC App. at 61a).

Secondly, assuming *arguendo* that a conflict did exist, the ICC concluded that the statutes could be harmonized by confering an exemption from the RLA under the limited circumstances contained in section 11341(a). It cited, and adopted, the extensive discussion analyzing the legislative history of the underlying provisions, including their accommodation with the RLA, that was set forth in *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry. Co.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1983), (*BLE v. CNW*) (ICC App. at 59a-61a). Interestingly enough *BLE v. CNW* is cited in neither union cross-petition.

As the ICC said:

> If our approval of a transaction did not include authority for the railroads to make nec-

> essary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to Congressional intent. [Citing *BLE v. CNW's* extensive discussion of the legislative history and the Harrington Amendment.]

(ICC App. at 60a).

Consequently, the ICC has more than satisfied the teaching expressed in *Watt, Burlington* and similar cases.

Cross-petitioner BLE lodges a more direct challenge. It contends that the *Shore Line* and *Telegraphers* cases raise an absolute bar—however an ICC decision may be rationalized or reconciled—to any interruption of the RLA section 6 process by the exercise of the ICC's section 11341(a) exemption power. The *Shore Line* case is totally inapposite. While its conclusions as to the meaning of the *status quo* provisions of the RLA are unassailable, the case dealt with a unilateral employer change in working conditions. Under either of the ICC's alternative theories of decision, such a unilateral interruption of the *status quo* is not at issue here. As the Commission noted, no violation of the *status quo* provisions was established. And even if the *status quo* was in some degree altered, it was only to the extent necessary to effectuate the transaction found required by the public interest. The carriers were, therefore, *pro tanto* exempted from the RLA.

The *Telegraphers* case is only superficially more in point. The regulatory actions purportedly giving rise

to the dispute were actions of *state* agencies, which lacked the power to exempt parties before them from "all other law." Thus, the Commission's exemption powers were not implicated and there were no arguably conflicting statutes to reconcile.[15]

Moreover, the Court clearly implied that the regulatory applications were incidental. 362 U.S. at 338-342. See especially footnote 16:

> Moreover, this railroad operates in nine States; it has instituted proceedings in the state regulatory commissions of four only and at the time of the District Court's decision, only two of these had rendered a decision. Yet, the union's proposal was to negotiate for a clause which would apply to respondent's entire system. The railroad's refusal to bargain was not limited, however, to operations in the four States in which proceedings had begun. And even assuming that the order of one State, South Dakota, was mandatory and that this fact is of importance, it would not relieve the railroad from any duty it had to bargain on the proposed contract change in the eight other States involved.

---

[15]As the Court said:

> Nothing the unions requested would require the railroad to violate any valid law or the valid order of any public agency.
>
> 362 U.S. at 340.
>
> Here the unions would compel the Missouri-Pacific to violate the trackage rights agreement the ICC found *required* to cure the otherwise impermissibly anticompetitive effects of the consolidation.

362 U.S. at 340, n. 16.

None of the arguments advanced by the cross-petitioners establish any inconsistency of the decisions of the ICC and/or the court of appeals with any decision of this Court.

III. There Is No Conflict In The Circuits Concerning The Issue BLE Seeks To Place Before This Court

The only conflict in the circuits pertinent to this case involves the issue of which petitioners ICC and MKT seek review. (See MKT petition at 13-15 and AAR/NRLC *amici* brief at 12-16). The BLE's attempt to create a conflict with the *St. Louis-Southwestern* and *Texas & New Orleans* cases falls short of the mark. Those decisions are simply not at war with the court of appeals decision. Only the *Texas & New Orleans* case is tangentially relevant, but the arguably similar aspect of *Texas & New Orleans* accords with the court of appeals treatment of the comparable issue below.

St. Louis, Southwestern is a singularly inappropriate authority. That case turned exclusively on the question of whether the underlying controversy was a major dispute or a minor dispute under the RLA. The ultimate decision was an interesting addition to RLA major/minor dispute learning, but it had nothing to do with the displacement of the RLA. BLE argues that the decision resolves the issue of the primacy of the RLA over the Bankruptcy Act (inasmuch as the lines affected were lines acquired from the bankrupt Chicago, Rock Island and Pacific Railroad). If the decision had done so, it would be of only marginal utility in evaluating the outcome of a clash between

section 11341(a) and the RLA. But the decision did not do so; it is utterly silent on any such clash of statutes—and the rail brotherhood appellant never raised such a claim. 665 F.2d at 989. Indeed, the carrier had previously entered a specific written agreement providing that the underlying work assignment issues were to be resolved by the section 6 negotiation processes. 665 F.2d at 993.

In *Texas & New Orleans,* the issue was whether the anti-injunction provision of the Norris-LaGuardia Act was displaced by section 5(11) of the Interstate Commerce Act. But the Court decided the case by deciding that there was no clash, not that the Norris-LaGuardia was paramount. The facts were that the operational changes in issue were proposed and agreements negotiated long before ICC jurisdiction was ever invoked. Indeed, the railroads, recognizing the applicability of the RLA, actually served section 6 notices on the Brotherhood of Railway Trainmen in May of 1960. National Mediation Board jurisdiction over this concededly major dispute attached in June 1960 and the dispute entered mediation. Only four months later was an application filed with the ICC—an application seeking authority to abandon certain track only tangentially implicated in the then-existing labor dispute, which was still in mediation.

More importantly, the Court gave full force to section 5(11). Even doing so, it found that section 5(11) had no bearing on the Norris-LaGuardia question: Norris-LaGuardia constituted a jurisdictional limit on the United States District Courts. The carrier sought to find substitute *jurisdiction* in section 5(11). The Court said:

> This section [5(11)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e. the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but the power of the court to grant injunctive relief. Thus section 5(11) does not, by express terms, grant the jurisdiction which Norris-LaGuardia withdrew.

307 F.2d at 156.

We have reservations about the correctness of that decision, but correct or not, it is not pertinent here.[16] Section 5(11) was given full force in *Texas & New Orleans;* here, its successor is sought to be straightjacketed.

And most importantly, the court of appeals held that if there *was* a clash between the labor laws and section 5(11), section 5(11) would reign supreme:

> If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, *we would have to conclude that Norris-LaGuardia was preempted by sec-*

---

[16]It may be pertinent to the UTU's petition for a pre-judgment writ of certiorari to the eighth circuit court of appeals, seeking review of the district court's enjoining a UTU strike of the MP over the trackage rights issue.

tion 5(11), even though section 5 is not labor legislation.

307 F.2d at 158 (emphasis added).

CONCLUSION

The cross-petitions for a writ of certiorari should be denied.

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Nos. 85-983, 85-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, *et al.*,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF CROSS-PETITIONS

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Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF CROSS-PETITIONS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company, intervenors in the court below, submit this brief in support of the cross-petitions for certiorari filed by the Brotherhood of Locomotive Engineers and the United Transportation Union.[1]

Union Pacific and Missouri Pacific support the unions' cross-petitions for the reasons set forth in their brief in support of the petitions for certiorari filed by the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company in Nos. 85-792 and 85-793.

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[1] The listing required by Rule 28.1 appears in Appendix A of the Brief of Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company In Support of Petitions in Nos. 85-792 and 85-793.

To resolve the conflict among the Circuits created by the decision below, and to preclude the regulatory confusion and industry chaos that the D.C. Circuit Court's decision would entail, this Court should grant one or more of the pending petitions to review the decision below.

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Nos. 85-983 and 85-997

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION TO CROSS-PETITIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1985

NOS. 85-983 AND 85-997

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

REPLY MEMORANDUM TO SEPARATE CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cross-Respondent Interstate Commerce Commission (the Commission) respectfully submits that the cross-petitions filed by the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE) in Nos. 85-983 and 85-997, respectively, further support a grant of the Petition for a Writ of Certiorari filed by the Commission in Docket No. 85-972. However, the Commission urges the Court to grant its petition and that of petitioner Missouri-Kansas-Texas Railroad Company (MKT) in Docket No. 85-793 rather than those of cross-petitioners.

All of the petitions present, directly or indirectly, the issue of the effect of 49 U.S.C. 11341(a) to remove all impediments to the implementation of transactions approved by the Commission under 49 U.S.C. 11343. More specifically, all of the petitions address the principal issue of the effect of Commission approval of a transaction subject to imposition of labor protective conditions upon the rights the parties would otherwise have in connection

with resolving disputes arising out of changes in working conditions associated with implementing the approved transaction.[1] The cross-petitions, however, raise additional issues never resolved by, or in some instances not presented to, the court below and the Commission, which are unnecessary to resolution of the principal issue raised by all parties to these proceedings.

STATEMENT

As to the facts of the case, there are no significant differences among the facts the various parties have presented to the Court in their respective cross-petitions and petitions. Briefly, the essential facts are as follows.

1. In October 1982, the Commission approved the proposed consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) Railroads. The Commission also granted the applications of the Missouri-Kansas-Texas (MKT) and the Denver and Rio Grande Western (DRGW)—for protective trackage rights to operate their trains with their own crews over MP tracks. To protect employees adversely affected by the approved trackage rights, the Commission imposed the standard labor protective conditions.

After DRGW and MKT initiated their respective trackage rights operations, UTC threatened a strike against MP and BLE and UTU initiated a Commission proceeding wherein they questioned the Commission's power to

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[1] This is a quite different issue from the one labor keeps positing of whether ICC approval authorizes rail management to make unilateral changes in working conditions and/or existing collective bargaining agreements. There is no dispute that, under the imposed labor protective conditions, the Missouri Pacific Railroad (MP) must negotiate with its employees and submit to binding arbitration, if necessary, protections to be afforded MP employees displaced as a result of MKT's and the Denver and Rio Grande Western Railroad's (DRGW's) commencement of trackage rights operations. What is at issue is whether MP rail labor organizations have the right to negotiate directly with MKT and DRGW or force MP to negotiate on their behalf over the crewing by MKT and DRGW of their authorized trackage rights operations.

authorize trackage right tenants to use their own crews over the lines of a competitor, thereby removing the crewing issue from the procedures of the Railway Labor Act (RLA).

2. In *Missouri Pacific R.R.* v. *United Transportation Union,* 580 F. Supp. 1490 (E.D. Mo. 1984) (*Missouri*) (affirmed 8th Cir. No. 84-1465) (decided January 15, 1986), a United States District Court for the Eastern District of Missouri-Eastern Division enjoined the UTU's threatened strike.[2] The District Court found that MP was exempted under section 11341(a), 49 U.S.C. 11341(a), from any requirements of the RLA to negotiate on behalf of its employees the crew selection clause in the approved trackage rights agreements. The court found further that the Norris-La Guardia Act restraints on a court's ability to enjoin labor strikes must give way to protect the integrity of the jurisdiction and orders of the Interstate Commerce Commission (*Id.* at 1503) and that the Commission may impose conditions that conflict with existing collective bargaining agreements and RLA procedures, noting that to hold otherwise would permit affected employees to block rail consolidations found to be in the public interest. The District Court relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.,* 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied,* 375 U.S. 819 (1963) (*C&NW*) for its conclusions.

3. As to the unions' challenge before the Commission, the Commission found that once the agency approved the trackage rights transaction subject to labor conditions, Section 11341 exempted the transaction from all impediments, including the RLA and existing collective bargain-

---

[2] This proceeding was the subject of a petition for certiorari before judgment in No. 85-1054 which has been reformulated by supplemental pleading in light of entry of a decision on appeal by the court of appeals. The Commission received the pleading on January 31, 1986. The Commission sought and obtained an extension until 30 days from the date on which petitioners' supplemental brief is received to respond to the petition in that proceeding. This makes the Commission's response to that petition due on March 3, 1986.

ing agreements, as necessary to permit implementation of the transaction. The Commission also relied upon *C&NW* in support of the position that no findings by it were required to effectuate the exemption provided by Section 11341. The agency also observed that nothing in the record suggested, and no party had argued, that approval of the trackage rights applications subject to the labor protective conditions mandated by 49 U.S.C. 11347 would be inconsistent with the RLA.

Review of those decisions of the Commission was sought before the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers* v. *Interstate Commerce Commission,* 761 F.2d 714, petitions for certiorari pending (*BLE* decision). A majority of the panel of the court in *BLE supra,* over a dissent by Judge MacKinnon, found that the RLA may not be waived without an adequate Commission finding of necessity for doing so, and that the Commission failed to make such an adequate finding. Judge MacKinnon in his dissent emphasized that the majority had failed to come to grips with the holdings of the Eighth Circuit in *C&NW,* this Court in *Schwabacher* v. *United States,* 334 U.S. 182 (1948) and the District Court in *Missouri.* In addition, although disagreeing with the majority's findings requirement for displacing RLA procedures, he found that the agency had, in fact, met such a requirement.

ARGUMENT

It is clear that all parties agree that the issues presented by the Commission's petitions and the unions cross-petitions are extremely important to the entire rail industry (both management and labor) and to the orderly administration of both the Interstate Commerce Act and the RLA. (See I.C.C. Pet. in No. 85-792 p. 17, Brief of Association of American Railroads and National Railway Labor Conference As Amici Curiae in support of Pet. in No. 85-792 at p. 17, UTU Cross-Pet. p. 16 and BLE Cross-Pet. p. 22-23). The labor unions, the Commission, and the railroads all seem to believe that the lower court decision

was wrongly decided (See ICC Pet. in No. 85-792 p. 10-17, BLE Cross Pet. in No. 85-997 p. 11, 19-23, UTU Cross Pet. in No. 85-983 p. 12 and 15).

Although the Cross-Respondent Commission agrees with the cross-petitioners that the issues presented by the lower court decision should be reviewed by this court, cross-respondent believes its petition in No. 85-792 and that of MKT in No. 85-793 set forth the proper framework for resolution of the issues in dispute, while the cross-petitions do not. This is so because, in the Commission's opinion, the cross petitioners set forth issues which unnecessarily complicate the analysis and resolution of the principal issue involved—the effect of the Commission's approval of a transaction, subject to Commission imposed labor protective provisions which require compulsory arbitration, upon the rights of rail labor and management under pre-existing collective bargaining agreements and other agreements and laws governing railroad labor relations.

1) It cannot be gainsaid that implicit, if not explicit, in the holding of the court below and the question the Commission presents to this Court in No. 85-792 is: whether the Commission has authority under any circumstances to approve transactions which require changes in working conditions. However, the Commission believes its authority to approve such transactions is so well settled by a consistent line of recent courts of appeals decisions, as not to warrant plenary consideration by this Court. See e.g. *C&NW, supra,* 314 F.2d 424 (wherein the court of appeals, after extensive, and in the opinion of the Commission, correct analysis of the relevant decisions of this Court and the legislative history of the predecessor provision of Section 11341(a), concluded that the Commission was authorized to do so); *Nemitz* v. *Norfolk and Western Railway Company,* 436 F.2d 841 at 845 (6th Cir. 1971), affirmed in *Norfolk & Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971) (same); *New York Dock Ry* v. *U.S.,* 609 F.2d 83 (2nd Cir. 1979), (wherein the court of appeals recognized

that rail mergers call for major changes in working conditions and went on to approve the Commission's imposition of the *New York Dock* labor conditions, as satisfying the requirements of 49 U.S.C. 11347, including a principal *New York Dock* condition that requires compulsory arbitration of disputes arising out of changes in working conditions associated with implementing Commission approved consolidations); *Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) (*RLEA*) (wherein the court of appeals approved: the Commission's imposition of labor protective conditions, in connection with trackage rights or lease transactions, that provide for compulsory arbitration of changes in working conditions; and found the imposition of such conditions imposed labor protection satisfied the requirements of 49 U.S.C. 11347); and *Matter of Chicago, M. ST. P. & Pac. R. Co.*, 658 F.2d 1149 (7th Cir. 1981) (Arising under the Milwaukee Railroad Restructuring Act, approved labor protective conditions requiring compulsory arbitration and permitting operations before an agreement is negotiated, in reliance on Commission precedent).

2) None of the cases relied upon by Cross-petitioners suggest a contrary result with the possible exception of *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), which, if it is determined does so, we submit is wrongly decided: The Court's decision in *Short Line* v. *Transportation Union*, 396 U.S. 142 (1969) and of the United States Court of Appeals for the 10th Circuit in *St. Louis S.W. Ry. Co.* v. *Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981) do not deal with Section 11341(a) at all, but rather deal with the status quo which is to be maintained pending mediation under the RLA. *City of Palistine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 433 U.S. 950 (1973), on the other hand, addresses Section 11341(a) but has nothing to do with its relation to the RLA. Moreover, *City of Palistine* recognizes at least the qualified exemption from other laws conferred by Section 11341(a) and accept-

ed by the majority of the panel below; Cross-petitioners by their cross-petitions take exception to this.

This leaves only *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) (*Texas*). The broad language of this case arguably supports the position of cross-petitioners. However, the Commission believes that decision is properly confined to its peculiar facts and in any event is distinguishable from the case at hand. In *Texas*, the involved railroads had commenced the collective bargaining process under RLA prior to seeking approval of the involved transactions. Negotiations under RLA failed and the railroads then submitted to the Commission, proposed methods of operating not shown to be necessary to, or for that matter even desirable in, effecting the proposed transactions, which exactly mirrored the changes management had unsuccessfully sought to negotiate under RLA. The railroads contended that Commission approval of the transactions relieved them of any further obligation to negotiate the involved changes under RLA or, for that matter, any other provision of law. Under these circumstances, it is not surprising that the court in *Texas* and other courts that have referred to it have concluded that mere filing with the Commission of a proposed plan of operating does not permit management unilaterally to implement that plan.

The situation addressed in *Texas* differs markedly from the situation in the proceeding under review in a number of material respects. First, in this proceeding, the process for changing working conditions was not commenced by service of RLA's so-called Section 6 notices (45 U.S.C. § 156), but rather pursuant to the Commission's imposed *New York Dock* and *N&W/Mendocino* labor protective conditions. Second, as indicated in fn 1, *supra*, MP has never contended that it is not obligated to bargain with its employees over displacements resulting from the commencement of trackage right operations and, according to cross-petitioners, MKT has already bargained with its em-

ployees (See UTU Cross-Pet. p. 6–7; BLE Cross-Pet. p. 6). At issue is simply whether this bargaining takes place under the Commission's conditions which provide for compulsory arbitration in the event of an impasse, so as to assure that the approved transaction ultimately will be effected, or under the RLA procedures which do not provide for an assured resolution and are designed to stretch out the bargaining process. Finally, the issues removed from negotiation are not among parties to the transaction and their employees but, rather, as recognized by the district court in *Missouri,* reflect conditions imposed on applicants in connection with Commission approval of their merger over which they have no control and concerning which they have no right to vary the terms (580 F. Supp. at 1503; Addendum A to Petition in No. 85–792 at 23a–24a).

3) Other issues cross-petitioners seeks to raise either were not presented to or were not ruled on by the court below, and, hence, if their resolution were essential to resolution of the principal issue (which they are not), this Court would have to remand the issue to the court below or the Commission (which it need not).

a) Cross-petitioners seek (UTU Cross-Pet. p. 11–12; BLE Cross-Pet p. 11–13) a declaration that 11341(a) cannot supersede 11347—an issue which they concede the court below expressly declined to address (UTU Pet. p. 11). This issue would only be relevant if the Commission had failed to impose the minimum labor protection required by Section 11347. However, it is undisputed that the Commission imposed the so-called *New York Dock* conditions on its approval of the merger and the so-called *N&W/Mendocino* conditions upon its approval of trackage rights. Both of these sets of conditions have been approved as satisfying the minimum conditions required by Section 11347, despite arguments substantially similar to those inappropriately raised by cross petitioners here. See especially *RLEA, supra,* 675 F.2d at 1255.

b) To the extent cross-petitioners contend that either the Commission's conditions or section 11347 require negotiations between MP employees and MKT or DRGW in connection with the exercise of the trackage rights authority granted them, cross-petitioners cite absolutely no authority for the proposition. This is not surprising because there is none—a fact ignored by the majority below, except in connection with its holding that the petition is not time barred. See dissenting opinion in *BLE*, 761 F.2d at 729. However, the novelty of rail labor's argument does explain why the Commission took pains to explain to them its position on the subject.[3]

c) Finally, cross-petitioners argue (BLE Cross-Pet. p. 12–13; UTU Cross-Pet. p. 20) that article I, section 2 of both the *New York Dock* and *N&W* conditions prohibit changes in working conditions, except pursuant to RLA collective bargaining procedures. That argument, which was raised in passing before the Commission, was disposed of summarily by it (noting that the provision had to be read in the context of the Commission-approved transaction as a whole) and was not addressed at all by the court below. A

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[3] BLE contends (BLE Cross-Pet. p. 13 and 15) that the Commission's action in doing so is contrary to its own decision in *Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977) (Leavens) and this Court's decision in *Norfolk & Western Ry. Co.* v. *Nemitz*, 404 U.S. 37 (1971). Contrary to BLE's suggestions, the Commission's actions in issue are consistent with both the *Leavens* and *Nemitz* cases. Here as in *Nemitz*, rail labor appeared to be questioning the overall coverage of the protective conditions imposed, at least as they related to the asserted right of MP employees to negotiate with MKT and DRGW over the manner in which they would institute approved trackage rights conditions. In *Leavens*, the Commission acknowledged the obligations imposed upon it by this Court's *Nemitz* decision to determine the overall sufficiency of agreements entered into between labor and management to meet statutorily required or Commission imposed labor protective conditions (348 I.C.C.; at 976–78), but held that this obligation did not extend to individual labor controversies such as the placement on the merged seniority roster of an individual employee. The Commission held that arbitration, pursuant to the provisions therefor in Commission imposed labor protective conditions, was the proper mechanism for the resolution of such disputes (*Id.* at 979).

substantially similar argument was categorically rejected by the D.C. Circuit in its *RLEA* decision, *supra* 675 F.2d at 1255–56, and is presently pending before that court in *RLEA* v. *ICC and USA*, 85–1636 (D.C. Cir. filed October 1, 1985). The latter will furnish a better vehicle for review of the issue, should review be necessary. That decision (attached as Addendum B to the Commission's Petition for Certiorari in No. 85–792) also explains in detail the Commission's view that the WJPA and Amtrak conditions have been subsumed into the labor protective conditions imposed by the Commission upon approval of proposed transactions.[4]

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the previous petition of the Interstate Commerce Commission in Docket No. 85–792, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Cir-

[4] For present purposes it will suffice to note that the Commission's position is based upon its reading of this Court's decision in Nemitz coupled with the requirement of the 1976 amendment to what is now 49 U.S.C. § 11347 that the Commission impose upon consolidations labor protective conditions no less favorable than it has previously imposed (WJPA: See *Southern Ry-Control-Central of GA Ry.*, 311 I.C.C. 151 (1967)) and the so-called Amtrak conditions. The Commission did so and, as discussed *supra*, the resulting conditions have been found by the courts to satisfy the requirement of Section 11347.

cuit. The Court may wish to consolidate the Petitions filed in Docket Nos. 85-792, 85-793, 85-983 and 85-977.

Respectfully submitted,

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Cross-Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF CROSS-PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO BRIEFS IN OPPOSITION TO CROSS-PETITION

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Nos. 85-983 and 85-997

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and UNITED TRANSPORTATION UNION, *et al.*,

Cross-Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF CROSS-PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO BRIEFS IN OPPOSITION TO CROSS-PETITION

Both the cross-respondents Interstate Commerce Commission ("ICC") and the Missouri-Kansas-Texas Railroad ("MKT") agree that the decision below should be reviewed, although they suggest that only a limited review of the court of appeals decision is warranted—a determination if a finding of necessity by the ICC is required to exempt a carrier from collective bargaining and Railway Labor Act obligations. The ICC's ambivalent expressions, however, can be viewed as sponsoring the appropriateness of what it terms the broader question put by the cross-petitioners, that is, whether Section 11341(a) of the Interstate Commerce Act automatically exempts carriers from compliance with their contractual and stat-

utory labor obligations upon approval of a financial transaction by the Commission. Cross-respondents Union Pacific ("UP") and Missouri Pacific ("MP") support the cross-petitions filed by the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU"). The American Association of Railroads and the National Railway Labor Conference, as *amici*, agree that certiorari should be granted and, as BLE reads their brief, agree with the cross-petitioners that this Court should determine whether the carriers must follow the Railway Labor Act procedures in seeking to implement transactions sanctioned by the Commission (AAR Brief at 3, 7, 12, 19-20).

In sum, there is no dispute between the parties as to whether this case should be granted review. The only dispute centers upon the question to be presented. This reply, therefore, is submitted in support of the questions propounded by the union cross-petitions and tacitly underlying the question raised by the petitions.

ARGUMENT

All parties agree that BLE and UTU requested the ICC to hold that its order approving the consolidation of the UP, MP and Western Pacific and the applications of the MKT and the Denver and Rio Grande Western ("D&RGW") for trackage rights over MP tracks had not relieved any railroad from its Railway Labor Act obligations or the conditions prescribed for the protection of employees, and that crew assignments and manning issues were labor disputes and, therefore, not within the Commission's jurisdiction to resolve (See also BLE Petition for Reconsideration, JA 54). The ICC, however, held that it had jurisdiction to exempt under 49 U.S.C. §11341

(a) and that the exemption from the Railway Labor Act and all other restraints was self-executing under that section (BLE Cross-Pet. App. 66a). The questions raised by the unions before the appellate court are those questions formulated in the cross-petitions and decided by that court in its initial opinion. It is also apparent that all parties agree that the court of appeals in its amended opinion remanded to the Commission on the basis of its ruling that the ICC may not relieve a carrier from the Railway Labor Act dispute resolution procedures, as the Commission on reconsideration decided it had done in its initial order, without an adequate finding of necessity.

It is implicit in the ruling of the court of appeals that the Commission, in that court's view, does have jurisdiction over labor relations matters, including crew assignments, seniority and any other subject that conceivably could impede a transaction, and therefore can relieve a carrier from its Railway Labor Act obligations or, stated conversely, can deprive railroad employees of their collective bargaining and Railway Labor Act rights. Also, it cannot be questioned that this holding is the very foundation of its decision and goes to the heart of the issue raised by the employee representatives, BLE and UTU. The ICC and MKT nevertheless suggest that the only question this Court should consider is whether the carriers are automatically exempted by the Commission's order or whether, as the court below held, the Interstate Commerce Commission must in every case make specific findings of necessity.

This is a significance without a difference and the question the ICC and MKT now pose would not warrant review of this Court, for it is beyond cavil that the Commission, as any other agency, must supply some reasoned

basis for its determination and that its decision must be based on substantial evidence. *See, e.g., Northern Lines Merger Cases,* 396 U.S. 491, 503 (1970); *SEC v. Chenery Corp.,* 332 U.S. 194 (1947).

It would simply be a waste of the Court's time and resources to merely address the issue of whether the ICC is required to make specific findings of necessity in order to exempt the carrier participating in a Commission approved transaction from the requirements of the Railway Labor Act. Since the ICC and MKT take the position that the Commission's approval automatically exempts the rail carriers, and the Commission so decided in its decision on reconsideration, the issue before the court of appeals was whether the ICC approval authorizes the rail carriers to make unilateral changes in working conditions and in existing collective bargaining agreements in contravention of the duties imposed by the Railway Labor Act. In short, the real issue to be decided at this time is whether there is in fact a conflict between the Interstate Commerce Act and the Railway Labor Act and, if so, which statute governs employee-management relations in connection with ICC approved transactions. While disagreeing with the conclusory observation of the AAR as to the effect of the decision below, BLE notes that the AAR does cogently point up the ingredient question before the Court when it states at pages 18-19 of its *amicus* brief:

> The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE v CNW,* that the RLA is preempted with respect to the crew selection provisions

> of the approved trackage rights transactions. That will not ameliorate the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission * * *.

This case is an appropriate vehicle to determine the accommodation between the Interstate Commerce Act and the Railway Labor Act, if indeed a conflict exists between them. Only the cross-petitions present issues dealing with the preemption raised by the ICC and permitting the discussion and treatment of the conflict, if any does exist.

Moreover, the sudden departure by the ICC from its normal rulings as to its power over labor matters, and the breadth of this historical change relieving rail carriers of their contractual and Railway Labor Act obligations to their employees suggest that this Court consider the questions set forth in the cross-petitions.

(1) In this connection, contrary to MKT's assertion at pages 6-12 of its Brief in Opposition to the Cross-Petitions, the authorities previously cited by the union cross-petitioners and the most recent decision of the ICC in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation,* Finance Docket No. 30628 (served February 11, 1986), *infra* at 1a, in which the Commission refused to consider labor matters or the factual situation presented by the unions on the basis those matters are outside its jurisdiction, establish, if not inconsistent treatment, an abrupt, unexplained change in the ICC's approach to labor matters in the situation at bar. Thus, in the basic proceedings before the ICC, such as in Finance Docket No. 30,000 involving the UP-MP merger, labor matters are excluded as immaterial, or at best given short shrift, which is the Commission's customary approach.

Subsequently, on review, however, the Commission and the carrier (MKT) argue that the automatic exemption—according to their line of reasoning—on labor matters cannot be reviewed, because no evidence is in the record or the unions failed to challenge the treatment of labor matters contained in the financial agreements presented for Commission approval. This kind of reasoning, of course, forever forecloses railroad employees from exercising any voice in workplace decisions arising out of ICC approved transactions or from challenging in detail the legal and factual bases of the railroads' unilateral decisions that abrogate their collective bargaining rights. Moreover, neither the ICC, nor MKT has been able to explain the manner in which the decision of the ICC in this case, *i.e.*, the carrier is relieved of its collective bargaining obligations and from the mandatory duties imposed by the Railway Labor Act, complies with the labor protections imposed by it, which prescribe that existing collective bargaining agreements be maintained until changed by agreement or in accordance with the Railway Labor Act.

(2) As also is clear, the issue before the court of appeals was the same issue before the ICC, was directly decided by the court below in its original opinion, was necessarily embodied in the amended opinion, and was adequately preserved by the union cross-petitioners so as to be the basis of the question presented to this Court. Although MKT asserts that the BLE and UTU only argued to the court of appeals that there was a conflict between two separate provisions of the Interstate Commerce Act (MKT Brief in Opposition at 12-13), and therefore that court did not entertain or decide the issue now presented by the unions, this position begs credulity when one reads the opinion of that court. While the court of appeals seems

to correlate the Railway Labor Act and the labor protections imposed by Section 11347, it is clear that the court treated the current dispute as one over the ICC's claim "that the Railway Labor Act was a 'law' appropriately waived in the exercise of its exclusive authority," (BLE Cross-Pet. App. 20a). And later the court said, "the Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." (*Id.* at 22a).

(3) Finally, the statements of the ICC and MKT adroitly evade the concept implicit in the history of railroad employee protection and previous legal authority, *to wit,* the ICC formulated conditions do not intrude on the collective bargaining agreements in force or exempt railroads from the procedures of the Railway Labor Act, which statute is founded upon the policy of seeking industrial stability through the exercise of a voice by workmen in their industrial life. In 1936, railroad labor and management at the direction of Congress and the federal government reached an agreement on employee protection, which was called the Washington Job Protection and through amendments to the Interstate Commerce Act became the basis of the ICC formulated conditions. (*These* subjects are discussed in *United States v. Lowden,* 308 U.S. 225 (1939) and the appendix in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.,* 347 U.S. 298, 315 (1954).) This compact between the parties, which achieved statutory status, provided for specified labor protections to accompany certain economies and efficiencies sought by carriers. For years, the procedures for allowing these economies to the carriers and the concomitant benefits and protections to their employees worked smoothly and without controversy. Now, however, the Commission has without basis deprived the employees of their side of the

bargain and given the carriers unfettered authority to unilaterally act on labor relations matters. In effect, the Commission has removed the basis of the compact. Clearly, this is inequitable. At a minimum, the employees should be left where they were in 1936, *i.e.*, having the right to exercise the Railway Labor Act procedures.

Viewed from these perspectives, it is clear that the issue as posed in BLE's cross-petition is properly before the Court and represents the only issue worthy of this Court's consideration, particularly in light of pending and threatened litigation dependent upon resolution of whether Section 11341(a) relieves a rail carrier of its obligations under the Railway Labor Act or its collective bargaining agreements.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the cross-petition of the Brotherhood of Locomotive Engineers, said cross-petition should be granted.

Respectfully submitted

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APPENDIX

Decision of the Interstate Commerce Commission

(Decided January 24, 1986)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and The Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505,* (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construc. Acq. or Opr. R. Lines,* 365 I.C.C. 516, 518 (1982). Section 10901, how-

ever, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs., Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co.—Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. - Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the proposed transaction would result in the transfer of a rail line slated

for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.,* Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. - Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. - Southwest - Temporary Exemption* (not printed), served March 16, 1984. The Commission's holding that a certificate of abandoment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F.2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail transportation policy. We concluded that "although

the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are countervailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra.* In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self sufficiency. One of the considerations in this agree-

ment was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C.

11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action would not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley. Commissioner Lamboley concurred with a separate expression.

James H. Bayne
Secretary

(SEAL)

Finance Docket No. 30628

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusions on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and the seller's status, there is a conceptual distinction between

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1. This issue seems squarely raised by (1) the fact LCVA [sic] requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption,* 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901,* I.C.C. 2d (served January 15, 1986).